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# The Rise and Fall of the Chartered Corporation: A Historical Analysis

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The Development of the Charter up to 1500, the Rise of the Chartered Corporation post 1500, the Decline and Fall of the Charter as a Method of Incorporation in the 19th Century and the Potential for a Resurgence in the 21st Century.

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January 2012



### The Rise and Fall of the Chartered Corporation: A Historical Analysis – Abstract

Despite the increasing impact and pervasiveness of companies' law in the United Kingdom, little research has been undertaken to examine its development in the pre-registration, incorporation by charter period (pre-1844) and the 'revolution' of routine Companies Acts ending the charter monopoly. This work attempts to examine closely the development of the chartered body from its first inception in pre-Norman times through its commercial expansion in the 16th – early 19th Centuries culminating in not only its virtual de facto death but also its de jure death in 1844 with the rise of the registered corporation. In order to achieve this, both contemporary and modern evidence and commentary has been analysed, and a 'timeline' of developments created. As an integral part of this, the impact of case-law and jurisprudence will be considered, and the impact which it had upon the body of statute-law considered. Having presented, discussed and evaluated the evidence, the work concludes by discussing the possibilities for a chartered form of incorporation for commercial going concerns in the 21st Century and beyond. In the conclusion, it is hoped that suitable evidence will be provided to illustrate that the 'chartered' method of incorporation still retains a number of advantages over the more current 'registration method' and to apply these views to a modern company may not be as archaic and anachronistic as previously believed. To this end, a final case-study will be used to illustrate how this theory may work in fact.

T.K.C. Boardman-Weston

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## **Introduction**

As time progresses, and economies and corporate structures become more advanced, there is a clear need for legislation to evolve in order to perform its supervisory function. Taking this attitude too literally however, will result in ignorance and oversight of the development of the economy, the corporate entities and the law to its current state. In order to successfully guide these three concepts forward, it is important to have a knowledge of where they have been, and how they have changed throughout the centuries. This work will attempt to provide an overview of the historical development of the earliest form of truly corporate structure; that of the chartered corporation. This concept, due its very nature, will combine aspects of law, economics and corporations.

In this work, I shall seek to chart the development of the chartered form of incorporation from its earliest days and forms (pre- the Norman invasion of England, 1066) through its formative years, reaching a culmination in the reigns' of Elizabeth I and James I (and VI) before slowly losing pace and power before its virtual *de facto* death in 1844 with the advent of incorporation by registration under the Joint Stock Companies Act 1844.

In order to provide both colour and detail to a subject that may otherwise prove rather dry and historical at times; throughout the work numerous case-studies will be used to provide specific examples of legal, historical and economic phenomena. These will vary in length and content depending on their subject matter and the point that I am attempting to communicate.

In order to provide a 'running theme' throughout the work, and a sense of consistency that could otherwise be lost due to the changing focus of the work, following the charter around, the concept of corporate governance will be addressed at numerous different points in time, as the charter evolves. By this, I hope to illustrate the constantly changing nature of corporate governance

In the conclusion, I will attempt to illustrate that although the concept of incorporation by Charter is a somewhat anachronistic one, it would be foolish to relegate the concept in its entirety to the dustbin of legal history. With the use of News International<sup>1</sup> as a case study, I hope to illustrate that not only can the concepts of the past still be of value as we move further into the 21<sup>st</sup> Century, but also that the Chartered form of incorporation may well be due a revival as a practical alternative to registration and a sensible way of addressing the needs of an increasingly global economy and increasing public concern about corporate accountability.

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<sup>1</sup> See Chapter 7 for explanation of this, seemingly, rather odd choice of example.

## **Chapter ONE – The Ancestors of Chartered Corporations.**

The history of chartered companies is interesting, in that it will combine the study of two, initially quite disparate, disciplines; the history of charters as a form of legal prescription (originally a non-commercial instrument) and the history of companies themselves. It can almost be considered a form of legal sexual reproduction, the two concepts colliding and producing an offspring that has altered the face of the globe over the last 500 or more years.

As this piece of work will attempt primarily to analyse the history of chartered companies as a singular concept, it will not concern itself with many occurrences or developments before the mid to late 16<sup>th</sup> Century when the chartered trading company can truly said to have been born<sup>2</sup>. However, it would be foolish to continue without providing a brief ‘potted’ history of the two pertinent concepts up to this date, to aid understanding of the principles upon which latter developments were based.

### **i) Companies, Commerce and their Mechanics**

Commerce has existed in some form or another since time immemorial, in the form of barter, trade and other innumerable forms. As a result of this, there have been laws governing commerce as far back (and even slightly further) than scholars can see. In the surmised text<sup>3</sup> of the ‘Code of Urukagina’, there are believed to be references to trade, and these laws date back, conceivably, as far as 2380 BCE and the beginning of the Reign of Urukagina, a king of the Sumerian city-state of Lagash.

More relevant to this piece of work however, are laws relating, not to the regulation of trade itself, but to the regulation of business organisations and their internal mechanics, although clearly there can never be total separation between the two concepts. It is perhaps slightly surprising that laws relating to this area date back as far as the ‘Code of Hammurabi’ (circa. 1780 BCE). Sections 100 to 107<sup>4</sup> of this code specifically deal with the principles of partnership and

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<sup>2</sup> And the founding of companies such as the Merchant Adventurers, 1505 when it became an organism even approaching resembling a company.

<sup>3</sup> The body of the code itself has not been discovered, but its content can be extracted from references to it in third party texts. For further information, see Kramer, S.N., *“From the Tablets of Sumer: Twenty-Five Firsts in Man's Recorded History”*, Indian Hills: The Falcon's Wing Press, 1956

<sup>4</sup> For the full text of the Code, see: <http://www.wsu.edu/~dee/MESO/CODE.HTM>

agency. Not quite arriving at the polished discipline which we enjoy today in 21<sup>st</sup> Century England, but certainly indicative of a desire by states to regulate the internal mechanics of their trade.

In England, at the beginning of the medieval period there were two separate (but very closely intertwined) strands of law concerning commercial interests, the purely regional implementation of the 'pie-powder' courts and the international law of the *lex mercatoria*.

The pie-powder courts were courts with unlimited jurisdiction (not limited to purely commercial matters, but also with responsibility for a number of criminal offences) over the markets or fairs in which they were established, and as such were much localised in their nature. Although their jurisdiction was not limited to commercial matters, the very nature of their location (both geographic and temporal) made them primarily a commercial court. These courts were initially held under the auspices of the Lord of the Manor (or, more likely, his steward)<sup>5</sup>. Perhaps the best description of this court and its role (hence its inclusion in full) is given by Blackstone in his 'Commentaries on the Laws of England':

*"THE lowest, and at the same time the most expeditious, court of justice known to the law of England is the court of piepoudre . . . so called from the dusty feet of the suitors; or according to Sir Edward Coke, because justice is there done as speedily as dust can fall from the foot. . . But the etymology given us by a learned modern writer (Barrington, authors insertion) is much more ingenious and satisfactory; it being derived, according to him, from pied puldreaux a pedlar, in old French, and therefore signifying the court of such petty chapmen<sup>6</sup> as resort to fairs or markets. It is a court of record, incident to every fair and market, of which the steward of him, who owns or has the toll of the market, is the judge. It was instituted to administer justice for all injuries done in that very fair or market, and not in any preceding one. So that the injury must be done complained of, heard, and determined, within the compass of one and the same day. The court hath cognizance of all matters that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of an action arose there. From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster. The reason of it's institution seems to have been, to do justice expeditiously among the variety of persons, that resort from distant places to a fair or market: since it is probable that no other inferior court might be able to serve it's process, or execute it's judgements, on both or perhaps either of*

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<sup>5</sup> Or if in a 'free' town, then by the mayor and burgesses.

<sup>6</sup> From the Old English, '*céapmann*' meaning merchant or trader. (For the Old English Dictionary used by the author, see: [http://home.comcast.net/~modean52/oeme\\_dictionaries.htm](http://home.comcast.net/~modean52/oeme_dictionaries.htm))

*the parties; and therefore, unless this court had been erected, the complaint must necessarily have resorted even in the first instance to some superior judicature.”<sup>7</sup>*

Compared to ‘the lowest court known to England’, we then have the *lex mercatoria*, a similarly unofficial (in the sense of not being state sponsored) body of law covering the entirety of Europe. Formulated by the merchants themselves it ensured a consistent body of law throughout the increasingly international markets of trade. There was a requirement for rapid divulgement of justice and the existing law structure could simply not move at the pace required to adjudicate over commercial matters. Often the parties involved required a judgement within hours! Such a body of law became increasingly necessary as international trade increased.

Naturally, the implementation of the *lex mercatoria* was left to courts such as the pie-powder. This was an early example of the synergy required between the law and the world of commerce.

The *Lex Mercatoria* can be seen to be similar to two modern-day aspects of commercial law that are becoming more and more important. On the domestic side we have the clear use of arbitration and the ability to self-regulate, and on the international side we can see evidence of a Common Market arising to lubricate trade and commerce Europe wide. Neither of these factors will be discussed in any detail in this work, but is interesting to note the vaguely cyclical nature of the commercial world, ideas coming in and out of fashion. This concept will arise throughout this work.

Both of these courts can be considered an important ancestor of equity law, both deciding cases on an *ex aequo et bono*<sup>8</sup> basis, with concrete legal certainty falling inferior to a need for swift, fair decisions based on commercial, and not legal, practicalities:

*“The Lex Mercatoria provided to a great extent the foundation for the concept of Equity. As now understood, Equity is the basis for arbitration systems in a number of countries - as distinct from common law or statute law.”<sup>9</sup>*

It should be borne in mind, that at this stage in history (that is pre the mid-15<sup>th</sup> Century) the Court of Chancery had yet to develop, so the only courts of ‘equity’ (to perhaps stretch the term) were the merchants’ courts. As will be referred to in more detail in chapter 6 of this work, it was as late

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<sup>7</sup> For the full text see: [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk3ch4.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk3ch4.asp). Spelling modified by author.

<sup>8</sup> According to the right and good

<sup>9</sup> Mackie, J.C.S., “*Thesis on Commercial Arbitration in Commodity Trades*”, Arbitration 1991, 57(3), 156-162 (2.4)

as the late 20<sup>th</sup> Century that Lord Denning was still approaching companies law from a very equitable perspective and very much in the tradition of the *lex mercatoria*.

Self (that is non-state) regulation was the key to commerce in this era, when the State simply did not have either the will or the jurisprudential structure to successfully deal with the vagaries of merchants. It must be held in mind that at this point in time, as long as the country was secure and that taxes rolled in, the Monarch would have little interest in the private dealings of his citizens, as long as order was kept.

## **ii) Charta to Charter**

Now let us move to the concept of a 'charter'. Linguistically, the word arrives in English from the Old French word '*charte*', and previously to that from the Latin word for paper, '*charta*'. Such etymology is *prima facie* clear, as the charter itself would have been (and indeed remains) the paper document granting the relevant powers. We can also surmise from the word, that the concept was not in existence in England before the Norman Conquest (1066) at least in nothing similar to its continental successor. The English word for charter was '*yrfegewrit*', and it seems that there is no etymological osmosis between the words, and it is not unreasonable to assume, as a result, between the concepts.

A charter was a grant of certain freedoms to a certain class of people to behave in a particular way. These can be granted to corporations, to bodies charitable, to cities, and for any number of purposes. The earliest grants of charters in England were as a result of towns (more precisely, Merchant's Gilds<sup>10</sup> on behalf of towns) purchasing their freedom from the King very early in the reign of William I.

A very good definition was provided by Keane and Cawston in their seminal work, 'The Early Chartered Companies: (A.D. 1296-1858)'<sup>11</sup>:

*"A Charter, so named from the material on which it is drafted (Lat. charta, paper), may be defined as a written instrument by which the State confers certain privileges on corporate bodies, either to protect them in the exercise of their lawful avocations at home, or else to encourage and sustain them in their more hazardous ventures abroad"*

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<sup>10</sup> Not to be confused with the latter, and far more important, Craft Gilds.

<sup>11</sup> Cawston, G. & Keane, A.H., '*The Early Chartered Companies: (A.D. 1296-1858)*', 1896, EDWARD ARNOLD

*“Charters were first granted to municipalities and guilds of all sorts, whose operations were necessarily limited to particular localities within the State. Such documents were needed to protect the trades and industries of the country in times of almost chronic civil commotion, feudal oppression, and general lawlessness. Under such conditions these concessions were soon found – especially in England – to be as mutually advantageous to the Crown as to the privileges corporations.”<sup>12</sup>*

This is an important fact to note, these freedoms were sold they were not given away freely by the Monarch, in spite of any benefit-in-kind received by him from the Charter directly<sup>13</sup>. This should hardly be surprising given that a large proportion of the land in the kingdom was the personal property of the Monarch:

*“In mediaeval times title to land was the most weighty [sic.] question. The Norman conquerors claimed all towns existing in 1066 as direct fiefs of the King. When some urbanised rural settlement belonging to a feudal lord changed its character it had to apply to the King for a charter of incorporation.”<sup>14</sup>*

One of the most important benefits of becoming a chartered town was the ability to tax farm<sup>15</sup>. This involved the burgesses of the town paying a fixed sum per annum to the Crown, and in return being allowed to collect their own taxes, thus precluding the need for royal officers to be present for the purpose, such as the hated shire-reeve (Sherriff). There were clearly benefits for both parties here; the Crown was guaranteed a certain, stable sum per annum without the need to collect it personally, and the townsmen were not only freed from Royal supervision, but could frequently collect more in taxes than they paid for the privilege<sup>16</sup>. We can see the first vestiges of common pooling of investment for mutual profit.

From this brief analysis, it can be seen that although charters were not *de jure* restricted to commercial purposes they were such a natural vehicle for commercial growth that, *de facto*, this is arguably their most important and widespread legacy. Although such enterprises are a very long

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<sup>12</sup> Ibid. pp. 1-2

<sup>13</sup> Usually for a monetary sum, and not as with other tenants for military, or some other service.

<sup>14</sup> Kiralfy, A., 'Custom in mediaeval English law', 1988, The Journal of Legal History, 9: 1, 33

<sup>15</sup> Potentially a corruption of the Old English word '*feorm*', meaning (amongst other things); rent-in-kind, profit or benefit.

<sup>16</sup> For a more in depth analysis of the farming of customs and excise duties, see Smith, G., "Something to Declare: 1000 years of Customs and Excise", chapter one, S.4.

way from what we, in the 21<sup>st</sup> Century, would consider to be a company, it is easy to see how the foundations were laid.

In terms of corporate governance, at this early stage, there is little to separate the running of the corporation as a geographical/political entity and the corporation as a commercial enterprise. As talked about previously,

In the next chapter I shall move on to look at the birth of these chartered organisations and how they evolved to a much more recognisable form, that of the chartered trading company in the reign of Elizabeth I.



## **Chapter TWO - The Birth of Chartered Organisations**

As referred to in chapter one, initially charters were prescribed 'freedoms' to a group of individuals to act in a certain way and in effect to usurp certain powers of the monarch. It was established the grantor was the superior party in the relationship, to the inferior grantee. To provide adequate background to how this developed over time into an instrument of commerce and trade, we must begin by examining the initial purpose of the charter *in abstracto*.

The first Charter of the City of London (1075) granted to the citizenry by William I (The Conqueror), confirmed privileges enjoyed under Edward the Confessor and allowed Englishmen some level of control over the city<sup>17</sup>. These privileges were steadily extended and in 1189 the City obtained the right to have its own Mayor, and in 1376 the commonalty began to be represented by the Court of Common Council, in addition to the Court of Aldermen. In a society based firmly on feudal privilege, this divestment of power from the Monarch (particularly in his capital!) is certainly an occurrence of note.

Bear in mind that under the Law of England and Wales (from William I to the present day) all land belongs, ultimately to the Crown<sup>18</sup>:

*"The fundamental principles of English land law are well known. With the exception of the Crown's demesne land, i.e. land which has never been granted away by the Crown, the title to all land in England is regarded as derived from the Crown. The most that any subject can hold is an estate in the land, which since 1925 (disregarding leasehold tenures) must normally be a freehold estate in fee simple. The Sovereign is lord paramount"*<sup>19</sup>

We begin to see, when we combine the ideas of what happened in London with the concept of 'sovereignhold'<sup>20</sup>, how the crown has divested itself of some power in respect of chartered entities. A charter can be seen as a devolvement of responsibility and power over an area of royal influence (corporeal or incorporeal) to a non-state actor.

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<sup>17</sup> Briggs, M. and Jordan, P., "Economic History of England", 1967, London, p.43

<sup>18</sup> See Chapter 1.

<sup>19</sup> Nugee, E., "The feudal system and the Land Registration Acts", 2008 L.Q.R. 586

<sup>20</sup> That is, absolute freehold.

Amongst the first recipients of Royal Charters were the University of Oxford and Cambridge. In 1231 Cambridge received a charter from King Henry III awarding the right of *ius non trahi extra*<sup>21</sup>, which allowed the University jurisdiction over disciplinary matters concerning its members, similarly:

*“King Henry III took the scholars under his protection . . . and arranged for them to be sheltered from exploitation by their landlords. At the same time he tried to ensure that they had a monopoly of teaching, by an order that only those enrolled under the tuition of a recognised master were to be allowed to remain in the town.”*<sup>22</sup>

*“It soon became necessary, to avoid abuse of the royal privileges conferred on scholars, to identify and authenticate the persons to whom degrees had been granted. Enrolment with a licensed master was the first step towards this; it was called matriculation because of the condition that the scholar's name must be on the master's matricula or roll, but later the University itself assumed this duty. . . A community of such complexity needed rules. To this end, as problems arose, Statutes were adopted by the whole body of the University. These were not at first arranged or codified, but were noted haphazardly in books kept by the Proctors. The earliest known version of these decisions is a copy made in the mid-thirteenth century, which is now in the Biblioteca Angelica in Rome.”*<sup>23</sup>

Here is an interesting example of powers devolved from the King, to a ‘corporation’ beneath him, the ability to formulate and codify their own ‘laws’, to discipline their members and to protect such organisations from outside interference.

An interesting offshoot of this devolvement of power is that the current Monarch (Elizabeth II) refrains from accepting Honorary Degrees, as they would, *de jure*, place her under the jurisdiction of the Chancellor of that University. This is clearly not a viable position for the Monarch to be in.<sup>24</sup>

It is not that much of a stretch to see how such privileges elucidated above have led to (nearly 1000 years later) the corporate form of charter we see today, and have seen for the last 400 years. The mayor exercises power in lieu of the crown, as does (although in a different way) a Chairman of the Board. Indeed we can also go further to compare the Court of Aldermen with a Board of Directors<sup>25</sup>. These bodies act as a legislature within their own private ‘fiefdom’, laying

<sup>21</sup> ‘The Right not to be Carried Away’.

<sup>22</sup> <http://www.cam.ac.uk/univ/history/records.html>

<sup>23</sup> <http://www.cam.ac.uk/univ/history/medieval.html>

<sup>24</sup> In conversation with the Secretaries’ Office Buckingham Palace, 15/02/11

<sup>25</sup> Which of course, until the late 17<sup>th</sup> Century was termed ‘The Court of Committees’.

out constitutions and exercising power as far as the law permits them to do so, one in terms of by-laws and one in terms of articles of association. It may be going too far to consider that the recent discussion for 'two-tier' boards imported from Germany is an unconscious attempt to emulate the governance of a Country (Upper house for Power (Lord/Directors), Lower House for Numbers (Commoners/Workers), but such a concept would seem not without some merit<sup>26</sup>. Both concepts however clearly illustrate the principle of distribution of power to both the powerful and the populace.

### **The Gilds<sup>27</sup> Merchant**

Clearly the above points concerning governance of towns and universities are illustrative of the development of charters and their powers, but they do not directly pertain to the scope of this work. Similarly although their powers have mutated over the years, they are far more sedentary in their evolution than the commercial charters. Institutions such as Cambridge University has little changed its fundamental *raison d'être* from the year of its founding, it is an institute of learning, and there are only so many methods by which one can teach. This is clearly not so with trading bodies!

Perhaps the first truly important charters, for our purposes, the direct ancestors of the Commercial Charters of later years, can be seen in the form of the Gilds Merchant. Due to their nature as the first directly relevant charters, I shall term them 'genesis charters'.

The Guilds Merchant really began as a simultaneous parallel to the growth of Medieval Towns and as a direct off-shoot of what, in contemporary parlance, we would term 'the middle classes'<sup>28</sup>. The aristocracy possessed land and derived their wealth from it, the working classes had no time or money to speak of and led a very hand-to-mouth existence, but the 'middle' classes required an outlet for their increasing wealth. In a feudal society clearly speculating in land would not be an option. A new market was needed. To quote Hill:

*"It was to escape from the serfdom of the feudal ages that towns, and guilds and corporations were formed; this was the origin of the Middle Classes: they formed those imperfect associations as the means of working out their own redemption, which it was*

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<sup>26</sup> See for example the recommendations of the Cadbury Report (1992) dealing with boardroom accountability.

<sup>27</sup> The differing spellings (i.e. gild to guild) can be explained in terms of linguistic evolution, and although the changing term does make a useful economic point, this is merely coincidental.

<sup>28</sup> The meaning of this word is self-explanatory, but dates from the mid to late 18<sup>th</sup> Century according to etymologists - <http://www.etymonline.com/index.php?l=m&p=21>

*impossible to obtain so long as they were within the influence of the baron and the feudal lord.”<sup>29</sup>*

Naturally as villages expanded and conglomerated to form towns<sup>30</sup>, the needs of the citizens expanded exponentially, and the concept of self-sufficiency suffered as a result. Those who were able to supply themselves with all the produce they needed may well decide to sell the remainder and either save the money, or spend it on products which they themselves were unable or unwilling to produce. We see the first steps towards a modern, market economy, going hand in hand with the rise of the middle classes. The rise of the merchant’s guilds can be seen as the first form of collective bargaining, a power capable of treating with Lords (both temporal and spiritual) and with the King in order to have some input into the regulation surrounding taxation.<sup>31</sup>

There was now a need for a middle-class, middle-man; a merchant. It was only possible for Freeman to become merchants<sup>32</sup>, by the very geographical and labour limitations placed upon a serf by feudal law, as free-men there was no Lord to answer to (at least not in the first instance). This ability to trade gave rise to a market economy (in both literal and economic senses). It has been said by Ibbetson that:

*“The late eleventh and twelfth centuries mark a watershed in the economic history of western Europe, with the birth of what we can recognise as a form of proto-capitalism after the economic sluggishness of the previous centuries.”<sup>33</sup>*

The Role of the Merchant Guild was primarily a regulatory one, and sought to enact a relatively modern distinction between the craftsmen and the merchants. However one cannot ignore the important municipal role played (almost incidentally) by these guilds. Naturally these organisations sought to concentrate their power and influence in the towns and what better way do to this than obtain, from the crown, freedom from state interference via a town-charter? In addition to this; who else would have access to the funds to buy this level of freedom, but the merchants? As a result of this the burgesses of the Merchants’ Guilds often became the burgesses

<sup>29</sup> Hill, J., *“Development of a measure for advancing the political, the social and the domestic condition of the working classes”*, Hume Tracts, 1845 - <http://www.jstor.org/stable/60204443>

<sup>30</sup> We get the word ‘bourgeoisie’ from these new ‘town-dwellers’.

<sup>31</sup> <http://www.middle-ages.org.uk/merchant-guilds-in-the-middle-ages.htm>

<sup>32</sup> Op. Cit. 1 at page 41

<sup>33</sup> Ibbetson, D., *“From Property to Contract: The Transformation of Sale in the Middle Ages”*, 2002, J.L.H. Vol. 13, No. 1 p. 1

of the Town<sup>34</sup>, although of course there was no direct correlation between the two organisations. It was a question of hats, to quote ‘Yes, Minister’.

Amongst the privileges granted to a town by charter was that of *firma burgi*<sup>35</sup>, which gave the town the right to elect magistrates, to hold a municipal court, to hold a market, to acquire corporate property and often to form a merchant’s gild. These rights placed the town outside of all jurisdictions save the Sovereign himself including, importantly, Royal Officers and local Lords. More importantly for our purposes however, we see the first real instance of corporate legal personality and existent-in-perpetuity here.

Furthermore, as mentioned above, the town obtained the right to collect taxes in the name of the King, in return for a lump sum payment. Perhaps the best example of this autonomy from local control is London, which was directly responsible to the King. Bolton provides a good description of the procedure engaged in in 1130:

*“The men of London offered 100 marks (£66.13s.6d) to be allowed to elect their own sheriffs . . . Effectively this would have made the citizens responsible for collecting all the Crown’s revenues, a considerable step forward in self-governance. . . More than that, the need to administer the revenues – for officials would have to be appointed to collect and answer for them – was to provide, in many cases, the nucleus around which town government could grow.”*<sup>36</sup>

In many cases the pre-existing (chartered or not) gild merchant provided a natural existing power and administrative base for these civic functions to collect. These bodies were often the only significant balances to the power of the local aristocracy and the Church:

*“Leicester was firmly under seigneurial control and the gild was virtually the only independent body in the town . . . Bury St Edmunds and Reading were both under the shadow of a great abbey and in both cases the gild acted as a focus of opposition to the Lord and emerged as the Town’s governing body”*<sup>37</sup>

The primary benefits of a Charter (not only Royal in nature, but seigneurial and ecclesiastic) were economic in nature, and foremost amongst these privileges was the exemption from tolls and the *de facto* creation of a free-market trade area. It would be foolish and incorrect to assume this

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<sup>34</sup> Op. Cit. 1

<sup>35</sup> Roughly translated as ‘Town Council’

<sup>36</sup> Bolton, J.L., “The Medieval English Economy 1150 – 1500”, 1980, pp. 128-129

<sup>37</sup> Ibid. at p. 130

extended over the whole of England, but certainly existed between towns and boroughs under the same Lord.

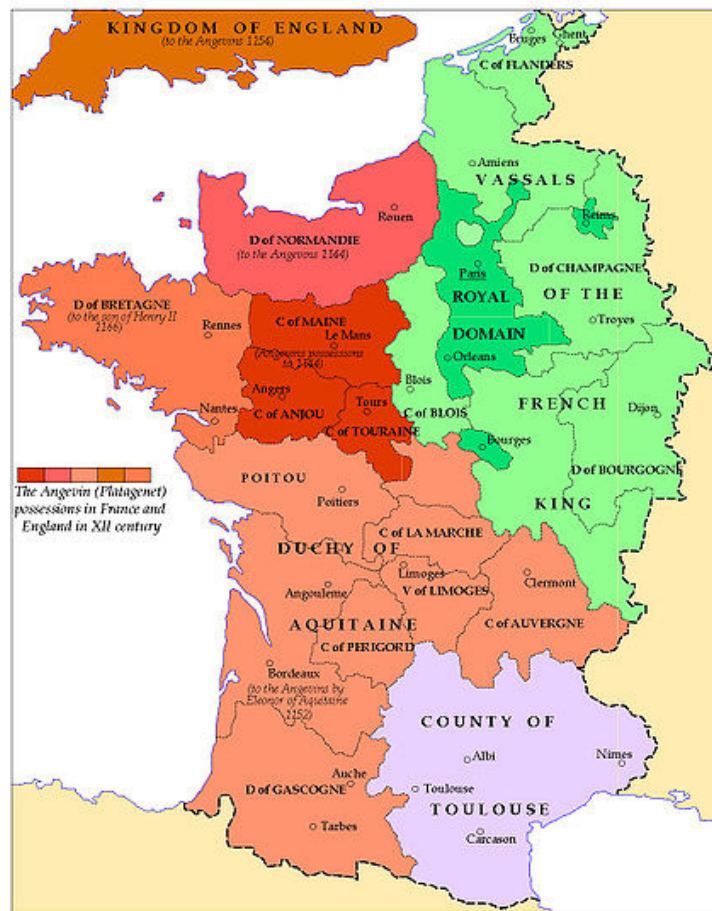
Bolton particularly refers to the royal demesne of Southampton and the list kept by the burgesses of that Town of other towns within the Royal 'control' who could benefit from free-trade with and within it, such as Newcastle, Yarmouth and Bristol<sup>38</sup>. Contrasted to this we have the geographically limited areas controlled by a single Lord, such as Durham under the Prince-Bishops which would be able to free-trade with other boroughs of the bishop such as Darlington. Inter-fief trade was a far more difficult and less common occurrence.

As limited as this may sound to the modern free-market economist, it was a vast improvement on the system existing on the continent of Europe at the same time, being as it was, far more divided and feudal, even in so called 'united' Kingdoms such as France. See the map below to illustrate that in vast contrast to England, the King was not the 'landlord' of France, but merely of part of it. France remained a fragmented state (often a state in name only), and as such its trade could not advance at the level of that beyond 'la Manche'. Even should 'free trade' exist in the lands of one Lord, such trade could not encompass towns and boroughs across the whole French domain, but merely in separate discrete parts thereof.

The nature of English aristocracy at this time (i.e. Norman) was to own land in both England and in ancestral Normandy. Such contra-channel possessions allowed for the embryonic development of international free trade.

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<sup>38</sup> Ibid. at p. 130



**Fig. 2.1<sup>39</sup> - Political Map of France 1154** (Showing English possessions in red/pink/orange)

Although such economic freedom was not always the result of a charter, we can see that in nearly every case a charter did lead to economic freedom and the growth that went hand in hand with it.<sup>40</sup>

Before moving on, and for the sake of completeness, it should be pointed out that London itself did not possess a gild merchant. As seen in the above analysis, such organisations arose to fill a governance-vacuum. There was no such problem in London, where local-governance had been well established long before the Norman conquest of 1066 and re-sanctioned afterwards, and was not tied so closely to the merchant classes.

<sup>39</sup> [http://en.wikipedia.org/wiki/File:France\\_1154\\_Eng.jpg](http://en.wikipedia.org/wiki/File:France_1154_Eng.jpg)

<sup>40</sup> For an example of a settlement that did not benefit to this extent from the granting of a charter, namely Warwick, see Bolton p. 131. Similarly for an example of a non-chartered borough that did enjoy economic success, Coventry, again see Bolton p.131

However, the charter was still primarily seen (and with the gift of hindsight can be seen now) as a civic tool appropriated by merchants and not a mercantile tool in its own right. This was soon to change with the increasing rise of mercantilism and the rise of the craft guilds.

### **The Craft Guilds**

Mercantilism is an economic theory with much in common with the more modern theory of protectionism, and the direct link between national wealth and security. However, the concept has slightly different connotations in the historical period with which we are currently dealing. The dictionary definition of mercantilism is:

*“The economic theory that a nation's wealth, esp. its ability to amass bullion, is increased by a favourable balance of trade, and that a government should encourage such a balance by promoting exports (esp. of manufactured goods) and restricting imports.”<sup>41</sup>*

In the current context of this work, I use the word to mean the protectionist attitudes not of the country as a whole, but of individual trades. Fundamentally, I use it to represent the opposition to competition within industries or areas that existed strongly up until the advent of free-market economic thinking under men such as Adam Smith and David Ricardo in the 18<sup>th</sup> Century.

The ‘genesis’ merchant corporations were soon subsumed and surpassed by another form of guild, the craft guild. These (according to Briggs and Jordan<sup>42</sup>) began to emerge in the 13<sup>th</sup> Century, a good two-hundred years after the first emergence of Merchants guilds.

Craft guilds were not specifically tied to the geographic region of a town or borough (although some tying did inevitably occur), but were tied to a specific trade over which they were the governing body and association. Perhaps the best succinct description of these guilds can be given by one of the oldest, the Saddlers:

*“Trade guilds or Mysteries, which grouped together merchants or craftsmen with similar interests and imposed regulations for the benefit of their members and the community in which they operated, have a long history. The word guild derives from the Saxon gildan (to pay), and refers to the subscription paid by members. Mystery comes from the Latin ‘Mysterium’, meaning professional skills. Thus while the recorded history of the London*

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<sup>41</sup> Third edition, April 2010; online version November 2010. <<http://www.oed.com:80/Entry/116609>>; accessed 19 February 2011. An entry for this word was first included in *New English Dictionary*, 1906.

<sup>42</sup> Supra. Note 1, p. 52



*guilds dates from the 12th Century; it is likely that similar organisations existed in pre-Conquest England. The medieval guilds, initially at least, were tightly-knit groups of men - and women - who sought to protect their trade and used the advantages given by the strength of the group to remedy the weakness of the individual in a feudal society, not least what are now deemed social services.”<sup>43</sup>*

If we examine the substance of a charter of one of these ‘companies’ then we can see a number of characteristics familiar to the modern company lawyer. The original charter of the Worshipful Company of Vintners (Ranked number 11 in the order of precedence<sup>44</sup>, and as such a ‘great’ company) is of particular interest as it in fact gives a monopoly over the wine trade with Gascony and so leads nicely into the early chartered trading companies. The full text of the charter of the Worshipful Company of Clockmakers, receiving charter in 1631, is attached in Appendix I. It is from the latter I reproduce the following 3 articles as indicative of common practice:

*“[King Charles](#) at the request of the clockmakers within and around the City of London and with the agreement of [the Lord Mayor](#), the Recorder and the Aldermen of the City of London decrees: . . .*

*2. That under that name, the Company should have perpetual succession.*

*3. That as a body, the Clockmakers’ should be entitled to acquire and dispose of property of all kinds.*

*4. That as a body the Company should have the same power as an individual to plead and defend any cause in any court.”<sup>45</sup>*

The primary difference between these craft guilds and the earlier merchants guilds [sic.] are that now we have trade-specific bodies aimed at regulating individual trades as where previously there were region-specific bodies aimed at regulating trade as a generic concept.

Were we to compare this to the articles of association of a modern company, we would see very similar privileges given. I shall further examine the similarities between these two historically distinct bodies in Chapter 7.

<sup>43</sup> <http://www.saddlersco.co.uk/thesaddlerscompany/origins.html>

<sup>44</sup> As laid out in 1515 by the Court of Aldermen of London.

<sup>45</sup> <http://www.clockmakers.org/about/royal-charter/>

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It is not difficult to see how these craft guilds, and latterly, livery companies<sup>46</sup> were the natural predecessor to the Chartered Trading companies, comprising a 'Court' of direction (although perhaps not 'directors'). A rather neat explanation of the prime difference between charters for guilds and charters for trading-concerns is provided by Keane and Cawston:

*"Such Charters (for guilds) may be said to stand in the same relation to the **trades** as those charters did to **trade** which were issued in favour of the merchant classes (e.g. Merchant Adventureres [sic.], East India Company et al.)"*<sup>47</sup>

Perhaps this is the key to the change from non-trading regulatory bodies to (eventually) single-account trading concerns. Charters assisted trade in both senses, in the first case by regulating and nurturing entire domestic industries and secondly by encouraging and protecting specific companies engaged in foreign trade.

Clearly the base for successful foreign trade could not be laid until a secure and stable domestic economy had been created. At the time of William, and indeed arguably throughout the entire middle ages:

*"... England had little to offer in exchange for foreign wares ..."*

*"Communities exclusively engaged in the production of raw materials – that is purely in agricultural and pastoral pursuits – are seldom traders in the strict sense of the term. They hold a somewhat passive position in all that concerns international traffic ..."*<sup>48</sup>

Until England had put its own house in order via ordered and regulated domestic industries, it could not hope to leave 'this sceptered Isle' and make its fortunes in Europe and further afield. The only trading concerns granted charters in this early period were either wholly foreign ones such as the German Hanse or the semi-foreign temporal anomaly of the Merchants of the Staple<sup>49</sup>.

As commented upon below, the existence of the Merchants of the Staple is an historical anomaly, arriving in its 'English' form a full 140 years before the next 'proper' Chartered Trading Company

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<sup>46</sup> Which these guilds were.

<sup>47</sup> Cawston, G. & Keane, A.H., *'The Early Chartered Companies: (A.D. 1296-1858)'*, 1896, p. 2

<sup>48</sup> Ibid. p. 3

<sup>49</sup> Although *de jure* an English corporation, it can be seen from both *Magna Carta Libertatum* and from further statutes issued in the course of the 13<sup>th</sup> Century, Englishmen were *de facto* excluded. It was not until 1362 that Englishmen were permitted to export 'Staple' goods from the realm, and as such were placed on an even footing with aliens.

of the Merchant Adventurers. That the Staple was a body before its time is undoubted, and even in the 17<sup>th</sup> Century work of Gerard Malynes was recognised as the first of its kind:

*“[The Staple] were the first and ancientest[sic.] commercial society in England, so named from their exporting the staple wares of the Kingdom long before the Company of Merchant Adventurers existed”*<sup>50</sup>

The Hanse remained a power until the Reign of Elizabeth and their expulsion from the realm, but the Staple suffered enormously due to its limited product base:

*“... no privileges could save from natural extinction a corporation which depended mainly on its exclusive right to export local produce, which produce, especially wool, was in course of time required by the rising manufacturing industries at home. Hence the Staplers received a fatal blow when the exportation of wool began to be prohibited by Statute”*<sup>51</sup>

The Staple<sup>52</sup> continued to exist as a mere shell, meeting once a year and electing officers as their charter demanded, but their existence was barely a ‘virtual’ one to quote Keane and Cawston<sup>53</sup>.

By the reign of Elizabeth I however, such preparation as was needed had well and truly been made and England was ready to expand to the next level of Chartered Corporations: Chartered Trading Companies. In the next chapter we shall examine in more detail these Chartered Trading companies, with particular emphasis on those companies of historical merit for example the East India Company.

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<sup>50</sup> Malynes, G., *“The Centre of the Circle of Commerce”*, 1623

<sup>51</sup> Ibid. p. 17

<sup>52</sup> Named from the Latin, ‘stabile emporium’ or ‘fixed market’. A market such as this was the only place where ‘staple’ goods could be bought and sold. The Latin word seems to have passed either through the Low German (‘*stapel*’ or ‘warehouse’) or through Old French (‘*estape*’ or ‘station’) to mean initially the place of sale and eventually the goods themselves.

<sup>53</sup> Op. Cit. at 31

## **Chapter THREE –The 16<sup>th</sup> and 17<sup>th</sup> Centuries, the Formation of the ‘Great’ Companies and their Rise.**

This chapter will seek to deal with the substantive rise of the first ‘great’ chartered companies, primarily those involved in overseas trade (for they possessed, arguably, the most influence in this period. but also those engaged in purely domestic activities such as the Bank of England.

We will, hopefully as the chapter progresses, see how the basis of modern companies’ law was laid during the 17<sup>th</sup> Century. In order to achieve this, after providing an overview of the general situation, I shall then engage in a case-study on the East India Company, in order to provide specific examples of how the powers of corporations waxed and waned. The East India Company was chosen for two prime reasons; firstly its sheer size and fame makes it an obvious choice to illustrate principles in a context which people will (to a greater or lesser extent) already be familiar with. Secondly, the ascendancy and subsequent fall of the company fits in almost perfectly with the wider time-line illustrating the rise and fall of the Chartered Trading Company in its more general existence.

Before the advent of the 16<sup>th</sup> Century, overseas trading bodies tended to be of an *ad-hoc* nature, both in terms of their stock-orientation and in terms of their business activities and legal basis<sup>54</sup>. In the 15<sup>th</sup> Century, trading concerns such as the Merchant Adventurers<sup>55</sup> and the Merchants of the Staple were in existence, engaging in trade with nearby European ports. These organisations did not possess Royal Charters nor were they incorporated in any way. They were simply associations of sole traders sharing the most basic of infrastructure, and a world away from the more advanced legal basis on which future firms were to be created and maintained.

By the early to mid-16<sup>th</sup> Century, we were still in pretty much the same situation as the preceding centuries, with little change in the area upon which to comment. Come the late 16<sup>th</sup> Century, however, we see more and more important companies arriving on the scene, ones which (in the fullness of time) would affect the economy and empire of Britain for many centuries to come.

Between 1500 and 1600, the following companies sprang into existence in something approaching a recognisable corporate form, that of possessing a ‘joint-stock’ nature (see below).

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<sup>54</sup> With the aforementioned exception of The Fraternity of St. Thomas A Becket (later, and better known as The Merchant Adventurers). Due to the anomalous nature of this body, little time will be devoted to its activities.

<sup>55</sup> Became a ‘regulated’ corporation in 1505, but existed before this, ‘ad-hoc’ (NOT ad-hoc joint stock).

**Table 3.1 – Joint Stock Companies formed in the 16<sup>th</sup> Century**

Merchant Adventurers – 1505 (although there is evidence to say that this company pre-dated their first charter (1505) by some 200 or more years)

Russia Company – 1553

Mines Royal\* – 1561

Mineral and Battery Works\* - 1565

Eastland Company – 1579

Levant Company – 1581

East India Company - 1600

\* Domestic Joint-Stock companies and, with the exception of the 1608 New River Water Supply Company, the only domestic companies to possess such status until the 1630's.

It was at this stage of development, that two differing 'types' of company began to emerge. On the one hand we have the 'Regulated' companies, and on the other, we have the 'Joint-Stock' companies. Before we continue, I shall provide a brief comparison of these two methods of organisation, and how they evolved from the pre-existing corporate/ commercial framework laid out in previous chapters.

**Regulated Corporations**

It is the regulated corporation that has its base most firmly affixed in history, being the obvious successor to the pre-existing guilds. However, like its Joint-Stock brethren, Regulated companies were engaged purely in profit-maximisation, and this is what differentiated them from their ancestors.

Members of regulated companies continued to trade on their own account, but shared the overheads as far as infrastructure was concerned, e.g. convoys, embassies, factories<sup>56</sup>. As a

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<sup>56</sup> Perhaps the best example of a firm of this nature was the 'Hanse' merchants of Northern Germany (commonly called the 'Hanseatic League'). This organisation possessed characteristics more in keeping with the old merchants' guilds than a modern JS company, as is quite clear from the 'Staalhof' (corrupted to 'Steelyard') in London. See Lloyd, T.H., 'England and the German Hanse, 1157-1611', pp. 2-3,50

further sub-division within regulated corporations, we have both ‘closed regulated’ and ‘open regulated’.

Regulated Corporations were jealous of their privileges and often came up against, and sought to bar from trade private traders (or ‘Interlopers’) and there are numerous statutes going back as far as the early 15<sup>th</sup> Century attempting to prevent such rampant exclusion. The State sought for open regulated<sup>57</sup> enterprises, but the corporations’ natural state of existence at this stage was firmly ‘closed’ regulated. See this excerpt from Keane and Cawston concerning an Act of 1406:

*“By paying of a ‘freedom fine’ of an old noble (about 18s.6d. of modern money) any person might consort with them; hence Malynes asserts that ‘of their privileges all the merchants and marines of England and Ireland were to be equally partakers without exception’”<sup>58</sup>.*

Another Act of 1497, showing how persistent the Fraternity of St. Thomas A Becket was in its exclusionist and mercantilist policies (for it was primarily they at this stage), re-iterates the desire for some degree of ‘freedom’ and a way ‘in’ for the Interlopers:

*“Every Englishman shall have free recourse to certain foreign marts without exaction to be taken by any English fraternity or fellowship, excepting only the sum of ten marks”<sup>59</sup>*

### **Joint-Stock Corporations**

The Joint-Stock Corporation combined aspects of the pre-existing ‘corporation’ with the new creation of ‘joint-stock’ ownership. The primary difference between ‘JS’ and ‘Regulated’ was that ‘JS’ companies traded on only one account. That is to say, all overheads were shared by all subscribers to the shares, they did not engage in separate and disparate business and trading on their own account. Here as well, we have a further subdivision into ‘permanent’ and ‘ad-hoc’ joint-stock companies.

*Ad Hoc* joint-stock companies did not possess the ‘rolling’, fluid nature of modern shares in that they were for a fixed time period, either for a certain voyage or for a period of years. This was, in many cases the initial experimentation that corporations did with regard to joint-stock projects. Over time however, they tended to evolve into permanent-joint stock companies. Perhaps the

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<sup>57</sup> By which is meant a desire for fluidity of trade (not a ‘closed shop’)

<sup>58</sup> Malynes, G., *“The Centre of the Circle of Commerce”*, p. 86 IN Cawston, G. & Keane, A.H., *‘The Early Chartered Companies: (A.D. 1296-1858)’*, 1896, p. 22

<sup>59</sup> Cawston, G. & Keane, A.H., *‘The Early Chartered Companies: (A.D. 1296-1858)’*, 1896, pp. 23-24

best example of this is the East India Company changing its style of ownership in this way in 1650, see Table 3.2 below.

Permanent joint-stock companies on the other hand were, in effect, what we consider today to be 'companies'. The share had a continuous existence, and was not automatically redeemed at the end of a fixed period. It was to this form that corporations tended to gravitate by the end of the period covered in this chapter. See Table 3.2 below. The real rise in Joint Stock companies occurred in the reign of Elizabeth I:

*"Incorporation of business enterprises began in England during the Elizabethan era. This was a period when businessmen were beginning to accumulate substantial surpluses, and overseas exploration and trade presented expanded investment opportunities. This was an age that gave overriding regulatory powers to the state, which sought to ensure that business activity was consonant with current mercantilist conceptions of national prosperity. Thus, the first joint-stock companies, while financed with private capital, were created by public charters setting down in detail the activities in which the enterprises might operate."*<sup>60</sup>

Harris believes that the reason for the differing forms of interpretation is due to the differing distances involved in the company's trade. Short-distance traders such as the French and Spanish companies would engage in a regulated trade organisation, but long-distance companies such as the East-India and the Hudson Bay companies would utilise a joint-stock system.

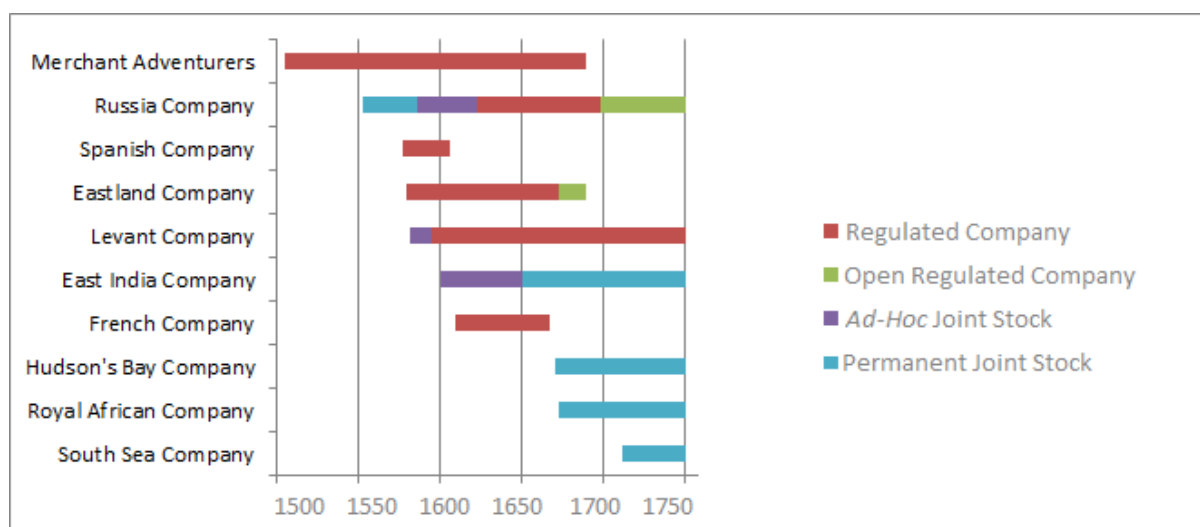
It should be noted that within this period it was not uncommon for corporations to change their legal form a number of times (see Table 3.2 below, particularly the Russia Company and its three changes of legal form in the time between its inception and 1750). Similarly, there seemed to be a trend away from regulated companies to Joint-Stock ones (and to longer joint-stock terms)<sup>61</sup> although this was by no means an absolute trend across the board. To illustrate this, I shall reproduce a table from the work of Harris<sup>62</sup>:

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<sup>60</sup> Encyclopaedia Britannica, "Business Organisation; History of the Limited Liability Company" - <http://www.britannica.com.ezphost.dur.ac.uk/EBchecked/topic/86277/business-organization/21818/History-of-the-limited-liability-company#ref105805>

<sup>61</sup> Harris, R., 'Industrialising English law', p. 25

<sup>62</sup> Ibid. at p. 52, Fig. 2.1

**Table 3.2 – Time-lines of 10 companies and their Corporate Forms**

N.B. – From 1750 to dissolution, the Royal African Company was an Open Regulated Company

From 1752 to dissolution, the Levant Company was an Open Regulated Company

During this period, England achieved victory in conflicts with other European States, defeating (in turn); Spain, Portugal, Holland and France<sup>63</sup>. By the 1763 close of the 'Seven Years War', England was the undoubted mistress of both India and America. An illustration of the knock on effect for the English economy can be given by the figures for imports/exports (the figures are a combined sum for both transactions, a modified cumulative Balance of Payments if you will) in the 17<sup>th</sup> and 18<sup>th</sup> Centuries<sup>64</sup>:

1613 - £4.5 millions

1720 - £20 millions

1796 - £50 millions

Heading off on a brief, but I feel important, tangent, it was as early as 1701 that contemporary authors and scholars began to associate this wealth with the growing foreign trade and the impact of (particularly, although not solely) the East India Trade:

<sup>63</sup> This conflict ran from 1756 to 1763.

<sup>64</sup> Birnie, A., "An Economic History of the British Isles", p. 166



*"The East India trade procures things with less and cheaper labour than would be necessary to make the like in England; it is therefore very likely to be the cause of the invention of arts and mills and engine, to save the labour of hands in other manufactures"*<sup>65</sup>

This illustrates another method by which this 'trade revolution' led to the later 'industrial revolution' and the changes in company law that such rapid growth necessitated.

However, such wealth was not won by the vagaries of free-marketeering and competition that we would today expect to lead to success and national wealth:

*"In the exploitation of her overseas markets, England followed the examples of her competitors and made use of monopolistic trading companies"*<sup>66</sup>

One of the most important aspects of the chartered-trading company in this period was the requirement for monopoly in terms of trading area, certainly as far as long-distance trade was concerned:

*"The nature of distant foreign trade demanded this . . . the home government could offer little assistance or protection . . . merchants had to provide for their own defence. . . In these distant regions, the trading company represented the State."*<sup>67</sup>

Although there did remain 'free-markets' such as the Caribbean and the American colonies, at some point during this period, most long-distance trade areas were monopolised by a single company. For example, the charter of the East India Company stated that it would possess a monopoly over India and the East Indies. This was by no means a uniquely English concept and by no means a new concept. As early as 1494 in the Treaty of Tordesillas<sup>68</sup>, Spain and Portugal divided the entire non-European world between themselves, with Spain controlling (*de jure*) all lands to the West of the Line and Portugal to the East:

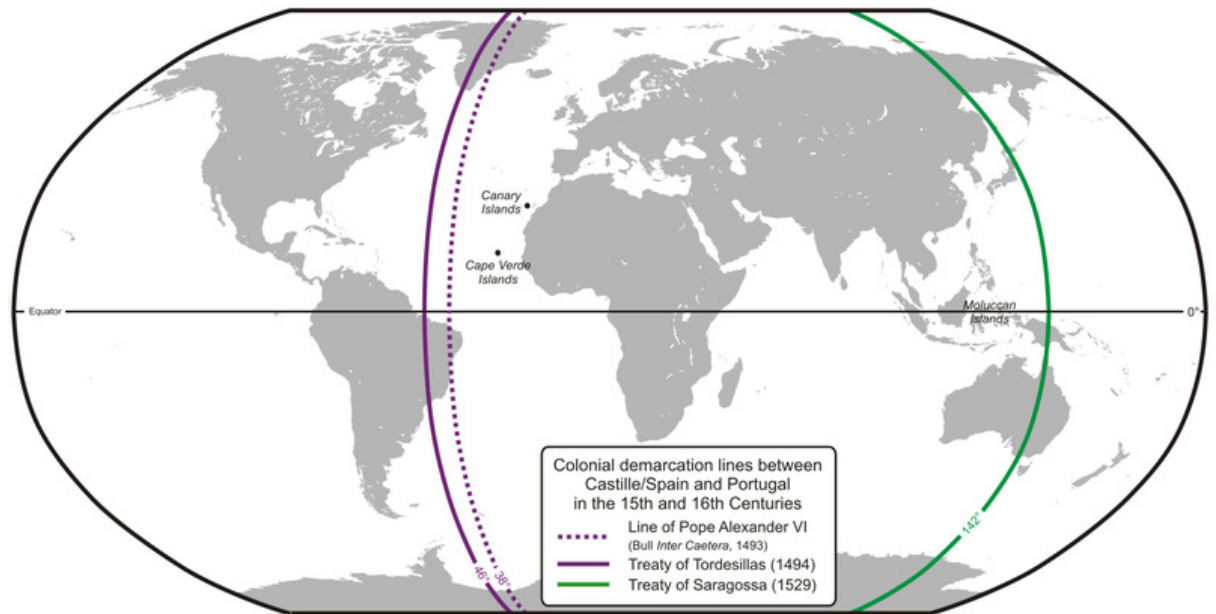
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<sup>65</sup> Mantoux, P., *"The Industrial Revolution in the Eighteenth Century"*, p. 137. Quote originally from *"Considerations upon the East India Trade"* (1701), by anon.

<sup>66</sup> Birnie, A., *Op. Cit.* p. 167

<sup>67</sup> *Ibid.*

<sup>68</sup> Charon, R., *"The linear league in North America"*, *Annals of the Association of American Geographers* 70 (1980)



**Fig. 3.3 – Protectionism via global duopoly – The Treaty of Tordesillas Line**<sup>69</sup>

Similarly, if the Crown (and later Government) was not awarding monopolies, then it could not charge the prices it did for a charter; these early trading companies paid for security. It was the concept of monopoly that was one of the most important to the Crown as it allowed it to obtain large sums of cash without recourse to Parliament. In 1623, Parliament attempted to stifle the absolutist tendencies of the Stuart Monarchy by passing the Statute of Monopolies<sup>70</sup>. This has been described by Bloxam as:

*"one of the landmarks in the transition of [England's] economy from the feudal to the capitalist".*<sup>71</sup>

In basic terms, this act diverted the powers to grant monopoly privileges from the Crown *per se* to the Government. As an interesting aside, this act is also considered to be the father of modern patents law.<sup>72</sup>

<sup>69</sup> [http://en.wikipedia.org/wiki/File:Spain\\_and\\_Portugal.png](http://en.wikipedia.org/wiki/File:Spain_and_Portugal.png)

<sup>70</sup> "An Act concerning Monopolies and Dispensations with penall Lawes and the Forfeiture thereof." - c.3 (21 Jac 1)

<sup>71</sup> Bloxam, G.A.. "Letters Patent for Inventions: Their Use and Misuse", (1957) *The Journal of Industrial Economics* (Wiley & Sons) 5 (3)

<sup>72</sup> Dent, C., "Generally Inconvenient': The 1624 Statute of Monopolies as a Political Compromise". (2009) *Melbourne University Law Review* (University of Melbourne) 33 (2)

**Case-Study: The East India Company**

In order to illustrate the power that a charter could grant to a company, perhaps it would be best to provide a brief history of the East India Company (henceforth; 'The EIC'), without a doubt the most powerful company ever to have existed. It is certainly a story that shows the very *ad-hoc* nature of companies' law (perhaps, at this stage, law is too concrete a term and 'regulation' should be used instead?) and the naked pragmatism and politicisation that played such a large part.

Chartered in December 1600 by Elizabeth I, The EIC was awarded a monopoly on trade east of the Cape of Good Hope and West of the Straits of Magellan (a distance of some 19,000 miles stretching between The Southernmost tip of Africa and the Chilean Pacific coast).

The first voyage, commanded by Sir James Lancaster, set off in 1601. The original aim to exploit the spice islands of the East Indies was hampered to some extent by the strong, existing presence of the Dutch East India Company (who had themselves acted to oust the Portuguese from the area), and as such the Company set its' sights upon the Indian subcontinent itself.

Bearing in mind the legal nature of this work, and not wishing to bore the reader with a length treatise on the historical development and expansion of The EIC, it would perhaps make sense now to slip forward a number of decades, to 1670.

By 1670, The EIC controlled a number of factories and fortresses in India, but most importantly, around this date, King Charles II gave (by virtue of Acts of Parliament<sup>73</sup>) powers to the company previously reserved for the Crown itself:

- Autonomous territorial acquisition
- Minting of money
- Commanding fortresses
- Commanding troops
- Making alliances
- Making war and peace
- The ability to exercise civil and criminal jurisdiction over its lands.

Such a grant was clearly not one that would be reproduced and given to other chartered companies, and as such is the perfect example of the *ad-hoc* nature of companies' regulation at this stage of history. It was these grants however that laid open the door for the Company to

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<sup>73</sup> See: "East India Company" (1911). [Encyclopædia Britannica Eleventh Edition](#), Volume 8, p.835

subdue directly large amounts of India, and to control indirectly, through puppet rulers, even larger amounts.

In order to provide a (highly tongue-in-cheek) example of just how much power this gave the company in India, I would briefly reproduce the following excerpt from the work of John O'Farrell:

*"Britain's Involvement in India had begun with the establishment of just a handful of small trading posts. But what started out as a few footholds on Indian territory ended up with the Brits completely over-ordering as usual.*

*'We'll have one Madras please, one Bengal . . . er, and a Bombay . . . And what's a Chota Nagpur?'*

*'That's a central Indian region sir, very nice, lots of minerals and timber'*

*'Yeah, we'll have one of those. And a Madhya Pradesh, and a Ceylon . . . Oh look, we'll just have the whole lot.'*<sup>74</sup>

Absurd as this illustration may seem, but it is not a million miles from the truth that once the King had awarded the EIC the powers of a sovereign, it did expand at a phenomenal rate. This large scale expansion did not go unnoticed by the Crown and parliament at home, and in the 1770's it was decided that Great Britain required a more direct mechanism of control over India than merely vicariously through the East India Company. Even before such problems as the Sepoy Rebellion of the 1850's, the country was clearly beginning to see the potential dangers of a corporate body exercising *de facto* all the powers of a state.

The East India Company Act 1773<sup>75</sup> firmly established that the acquisition of territory and subsequent sovereignty by a subject of the Crown was on behalf of the Crown, and not in its own right. The Crown took control of all company lands, but leased them back at a cost of £40,000 p.a. Ostensibly the need for this regulating act was the financial position of the EIC, resulting from the loss of the American tea market since 1768. It is estimated that 15 million lbs. of tea was rotting in EIC warehouses in the UK at this point, with more en route from India. Practically however, this Act was the first step down the road to the *Raj* and Government control (as opposed to mere oversight) of India. The Act made the following requirements:

- The EIC was to appoint a Governor-General of all the districts which it controlled. In 1771 these were; Bengal, Oudh and the Carnatic Coast.

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<sup>74</sup> O'Farrell, J., *"An Utterly Impartial History of Britain"*, p. 247

<sup>75</sup> 13 Geo. III, c. 63

- The British Government would appoint a 'Council of Four' to advise and control the Company Governor General.<sup>76</sup>
- British Judges were despatched to India in order to administer the legal system.

This Act was quickly followed by the India Acts of 1784<sup>77</sup> and 1786<sup>78</sup>, which I shall attempt to look at jointly due to their highly interconnected nature. The first of these acts attempted to lay out the demarcation lines between Company and Crown control of India by differentiating between commercial and political roles. In political matters the EIC came under the direct control of the 'Board of Control', a body consisting of the Chancellor of the Exchequer, the Secretary of State and 4 privy councillors chosen by the King. This act was considered a failure at the time, as it was not considered to objectively draw a line between areas of Company and Parliamentary control.

The Act of 1786 can be considered as the legislation that actually achieved what that of 1784 failed to do. It not only clearly laid out the boundaries between Crown and Company prerogatives, but also installed a mechanism for the emergency overruling of the Council of Four by the Governor General, and allowed the positions of G.G. and Commander-in-Chief to be held by the same person.

As a result of these regulations upon the Company, its influence in India continued to increase at a quick pace, no longer impeded by antagonistic relations with Parliament at home. To illustrate the increase in influence, let us compare the 'state of play' in India in the late 1700's (Fig.3.3) and the mid 1800's (Fig. 3.4).

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<sup>76</sup> This role was taken very seriously and could not be considered merely a 'sop' to the Company's critics. In 1774 the council went to India to investigate claims of corruption in the EIC administration. In 1785 the G.G. (Warren Hastings) was impeached.

<sup>77</sup> 24 Geo. III, s. 2, c. 25

<sup>78</sup> 26 Geo. III c. 16





Fig. 3.4 – British Influence in India 1785<sup>79</sup>

<sup>79</sup> Reproduced in part from: <http://etc.usf.edu/maps/pages/400/410/410.htm>





Fig. 3.5 - British Influence in India 1857<sup>80</sup>

<sup>80</sup> Reproduced in part from: <http://etc.usf.edu/maps/pages/400/421/421.htm>

The decline in the fortunes of the Company was to begin from a politico-legal sense as early as 1830 when, again, its finances became strained. This is hardly surprising when one considers the enormous military effort and expenditure undertaken by the Company in order to subdue all of India with the exceptions of Nepal, The Punjab and Sind. Under these conditions, the Company was forced to petition Parliament for assistance. In 1813 the Charter Act<sup>81</sup> made the following changes and additions to Company Rule:

- Asserted (again) the sovereignty of the British Crown over all Company territories.
- Renewed the charter of the EIC for a further 20 years, but with the following caveats:
  - The Company was deprived of most of its monopolies, with the exception of the tea trade, and trade with China.
  - The Company was required to keep separate accounts for its territorial and trading undertakings.
  - Missionaries were to be allowed to enter India.

In 1833 Charter Act<sup>82</sup> made further sweeping changes, and by this point it is quite clear what the intentions of successive British Governments were to the Company. The major changes enacted were:

- The removal of all remaining monopolistic privileges and commercial functions. For all intents and purposes the Company was now a purely administrative body. These administrative and political rights were renewed for a further 20 years.
- The Board of Control was now invested with full control over the Company, and the President of the Board was renamed, 'The Minister for Indian Affairs'.

One should however not imagine that as a result of these changes (or perhaps as a cause of these changes) that Britain had abandoned its national-monopolistic attitudes to trade and British influence. For example, the First Opium War<sup>83</sup> with China was fought purely over trade rights.

By this stage it became blindingly obvious that the Company was dying a death, as Britain became both willing and (perhaps more importantly) able to control directly its Indian territories. Even without the Sepoy Mutiny and the subsequent political fall-out it would have been only a matter of time before an Act of Parliament such as the Government of India Act 1858<sup>84</sup> was passed,

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<sup>81</sup> 53 Geo. III c. 155

<sup>82</sup> For a good summary of this Act, see: [http://www.indianetzone.com/24/the\\_charter\\_act\\_1833.htm](http://www.indianetzone.com/24/the_charter_act_1833.htm)

<sup>83</sup> 1839-1842

<sup>84</sup> 21 & 22 Vict. c. 106



removing as it did all vestiges of Company control over India and placing them firmly in the hands of Parliament. Effects of this Act were as follows:

- All of the Company's lands in India were vested in the Queen, and India was to be governed in Her name.
- The Secretary of State replaced the Court of Directors of the Company.
- The Crown was empowered to appoint the Governor General.
- An embryonic Indian civil service was created
- All other property of the Company was transferred to the Crown, along with responsibilities for treaties and contracts amongst other obligations.
- The armies of the Company ("The paramilitary wing of the London Stock Exchange"<sup>85</sup>) became assimilated with the armies of the Crown.

This was the end of the East India Company in India, and the beginning of the Raj. Technically the Company retained the role of managing the tea trade of the empire, but this was clearly a mere shadow of its former role as *de facto* master of the Indian subcontinent.

In 1874, the East India Company Stock Dividend Redemption Act was passed by Parliament. This formally dissolved the husk of what was left of 'John' Company. After nearly 300 years in one form or another, the EIC had simply ceased to exist.

What I hope this potted account of the EIC has achieved, is to illustrate clearly and plainly that what the Crown can give, the Crown can easily take away. As has been referred to many times in this chapter, the *ad-hoc* nature of companies was the key to understanding chartered companies. As easy as it was for the King or Parliament to grant wide-ranging and immensely powerful rights to bodies corporate, it was just as easy to strip them away for reasons of politics and pragmatism.

Theories of corporate governance will be dealt with later on in this work in Chapter 6, but it would seem appropriate at this juncture to state, without reservation, that the East India Company is concrete proof that at this period of time, the Theory of Concession held utter sway. This should come as no surprise when one observes that the prevailing economic standpoint held by Governments at this time was one of mercantilism. This similarly explains the attitude taken towards foreign interlopers in India (such as the French in Pondicherry) with the particular

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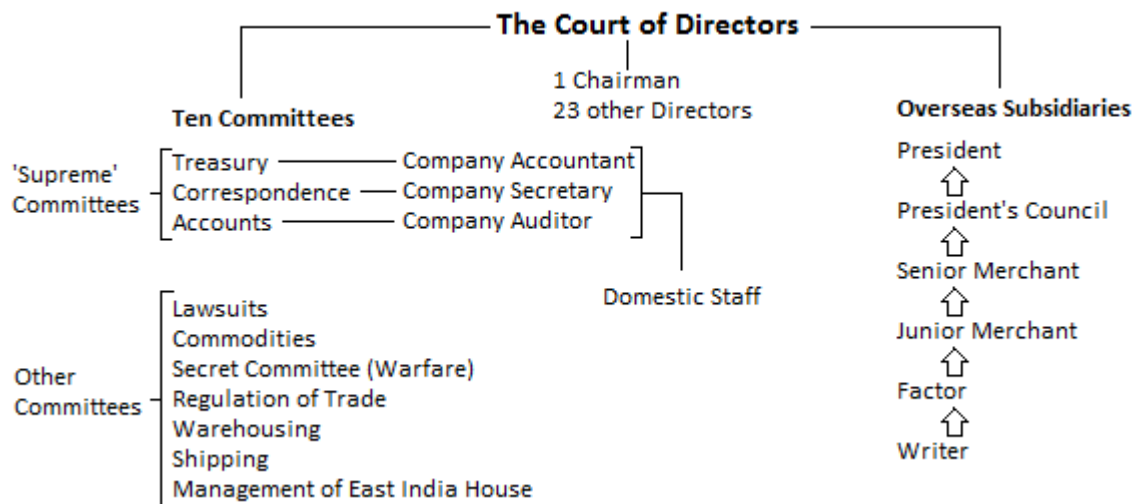
<sup>85</sup> O' Farrell, Op. Cit. p.247

mercantilist views of the day leading to a firm belief in a 'Zero-Sum' game in sub-continental trade.<sup>86</sup>

Clearly the East India Company was not the only chartered company operating during this period, but as the largest, most famous and most powerful, it seemed appropriate to use it as a scale by which to measure trends in the market as a whole. As such, I shall refer back to the East India Company periodically throughout this work as a comparator of a successful chartered company.

### **Governance of the East India Company**

It has been noted that one of the reasons for the longevity of the East India Company was its governance structure. Here I shall attempt to provide an outline of that governance and compare it (where prudent) to the governance structures of a 21<sup>st</sup> century organisation.



**Fig. 3.6 – Structure of the East India Company<sup>87</sup>**

The above diagram laying out the governance structure of the East India Company illustrates that *prima facie* there are few immediate differences present.

At the top of the company we have the 'Court of Directors' which was responsible for the setting of the company's goals via the overall strategy. Each of the directors was assigned to one of the ten committees, much as one might expect executive directors to be the head of a department in a modern, 21<sup>st</sup> Century company. The prime difference present here however is the lack of any

<sup>86</sup> I.e. 'Our gain is equal to their loss' and *vice versa*.

<sup>87</sup> Author's Own. 'Domestic Staff' in this context is used to note staff in England, as opposed to the 'overseas' staff employed by the regional factories.

role comparable to a non-executive director, the concept of internal oversight is not one that had yet arisen.

Although the structural design of the company owed a lot to that of the Dutch East India Company, the more pertinent (and important) aspect, that of the direction of the company was a more novel invention, differing markedly from that of the Dutch.

The involvement in the Dutch East India Company (VOC) of its shareholders was limited in the extreme, although one had to be a (significant) shareholder to qualify as a director, these directors were not chosen by the shareholders. In the VOC, a shareholder had a purely financial involvement in the company, and was not involved in the running of the company, either directly or indirectly.<sup>88</sup>

In Britain however, there has always been a link between the governance of a company and the 'grassroots' shareholders who provide the capital. To use the words of Robins, investors in the East India Company were given 'the franchise' and that 'like the England that gave it birth, the Company operated as a limited, property-based democracy, one that was run by and for its shareholders'<sup>89</sup>. Bearing in mind that each shareholder (holding £500 of stock or over) held only one vote, even more parallels can be drawn between the electoral system of the Company and of the Country at the time. To extend this comparison it can now be seen that in the 21<sup>st</sup> Century any shareholder can vote in the AGM of his company with no share-holding qualifications applied (above and beyond the need to hold at least 1 share), just as any citizen can vote in the parliamentary elections of the United Kingdom with no qualification based on property ownership.

The foreign subsidiaries of the Company had certain leeway over their own affairs, but were ultimately answerable to the Court of Directors in London.

To finish this section, I shall reproduce a very useful comparative tool from Robins<sup>90</sup> that directly compares the fundamental governance mechanics of the East India Company and 21<sup>st</sup> Century (2005) comparator:

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<sup>88</sup> Robins, N., *"The Corporation That Changed The World"*, p.30

<sup>89</sup> Ibid.

<sup>90</sup> Ibid. at p.31 (altered slightly by author)

**Table 3.7 – Governance comparison between the East India Company and a 21<sup>st</sup> Century Company<sup>91</sup>**

|                                | <b>East India Company (c. 1709)</b>                         | <b>Modern UK Company (Larger PLC) (c. 2005)</b>  |
|--------------------------------|---|--|
| <b>Formation</b>               | Crown charter, for limited period                           | General incorporation, unlimited life            |
| <b>Voting Rights</b>           | One vote per shareholder (holding over £500 worth of stock) | One vote per share                               |
| <b>Number of Directors</b>     | 24  | 10-20  |
| <b>Election of Directors</b>   | Annual elections of entire Board                            | Staggered elections                              |
| <b>Director Qualifications</b> | More than £2,000 in shares                                  | None   |
| <b>Election of Chairman</b>    | Indirect election, chosen by directors                      | Chosen directly by shareholders                  |
| <b>Board Composition</b>       | All part-time executives                                    | Majority Non-Executive, plus executive directors |
| <b>Board Limitations</b>       | Maximum 4 consecutive years; return after one year out      | Three year term, usually two terms               |

A surprising facet of the governance of the East India Company is the ability of the shareholders to hold the Court of Directors to task. What Pitt the Elder referred to as the ‘little Parliaments’<sup>92</sup>, or the annual shareholder meetings (the forerunner of the Annual General Meetings, or AGMs, of today) had the power to directly overrule the Court of Directors up until 1784. Perhaps by this date the Court had finally had enough of the shareholders awarding themselves dividends as high as 7-8%<sup>93</sup>!

Overall, although there are a number of pertinent differences between the corporate governance of the East India Company and a company in the 21<sup>st</sup> Century, there are perhaps less than would be expected. It is the view of Robins<sup>94</sup> that shareholders then had more power than they do today

<sup>91</sup> Reproduced, in part, from Keay, J., *The Honourable Company: A History of the English East India Company*, 1991

<sup>92</sup> Bowen, H., *“Revenue and Reform”*, p. 39, 1991 CUP, Cambridge

<sup>93</sup> *Op. Cit.* at 37

<sup>94</sup> *Ibid.*

over the running of a company and in terms of power of oversight over the Board of Directors. In the view of the author, although there is some merit in this opinion, this is an over simplification of the facts ignoring many pertinent developments in the field of company law, not least those of universal franchise and minority rights.

In chapter four, I shall look at three chartered companies that had as large a domestic impact on Britain, as the EIC had a foreign one.

## **Chapter FOUR – The Situation in 1700, South Sea Company, Sword Blade Company and BoE.**

Arriving in 1700, we have seen a large sea-change over the previous century or so in many aspects of companies. One of the main changes to be seen is the rise in importance of the so-called ‘domestic’ chartered company, in contrast to the ‘trading’ corporations in the earlier development of the corporation. Although there is some overlap between ‘trading companies’ and what came to be called the ‘moneyed companies’, by and large the latter was composed of domestic corporations.

The three most important domestic companies can be considered to be: The Bank of England, The South Sea Company and the Sword Blade Company. It is these companies that I shall concentrate on in this chapter, because they are indicative of the behaviour of domestic companies, for all intents and purposes they are the only domestic companies and finally because of the complex intertwining of their affairs and those of the State and the resultant web of regulation.

The Bank of England was established in 1694, the South Sea Company in 1711 and the Sword Blade Company in 1691.

### **The Bank of England**

The Bank of England was formed in 1694 by some of the greatest ‘names’ of the day such as Gilbert Heathcote, Theodore Janssen and many more beside<sup>95</sup>. The purpose of this venture was to act as banker to the Crown. As is mentioned in slightly greater detail in the next chapter, this only became an attractive proposition to the city in 1693, when the National Debt was established, with the government as guarantor, and not merely a personal loan to the king. A quote from Carswell illustrates the benefits of the new system.

*“When they did succeed in borrowing, their subsequent behaviour confirmed the contemporary maxim that business men should not put their trust in Princes – a maxim which, it was generally believed, made it impossible for banks to flourish except in republics”<sup>96</sup>*

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<sup>95</sup> Carswell, J., “The South Sea Bubble”, p. 22

<sup>96</sup> Ibid.

A loan of £1.2 million was advanced to the government, at a rate of 8% p.a and an annual service charge of £4,000, an overall rate of somewhere in excess of 13%<sup>97</sup>. The entire capital of the Bank of England only amounted to £1.2 million<sup>98</sup>; this could have posed a serious problem.

Before explaining exactly how the Bank of England managed to function, if its sole capital was lent out to the Government, it is necessary to engage in an analysis of some of the more complex existing forms of Exchequer debt. The tally, the army debenture and the naval ticket.

The tally was, simply put, a bundle of hazel twigs split down the middle, after having been marked with a 'code' expressing the amount paid into the exchequer. When brought together again, it would be quite clear that the two halves of the faggot 'tallied', and as such were impossible to forge.

During the period concerned with in this chapter, tallies were in effect a receipt for monies owed by the exchequer, in effect an ancestor of the promissory note. Until their redemption, naturally, these 'tallies' circulated at a discount, similar to many other financial instruments pre-redemption.

In addition to 'tallies', there were also army debentures and navy 'tickets' (payments to soldiers and sailors, again in lieu of cash). To quote Caswell again:

*"It was said in 1694 that bundles of tallies were to be found in every goldsmith's in Lombard Street. (A) bootmaking business in Bristol, held large sums in Army debentures issued against his contract for ammunition boots. In Deptford taverns the rising stationer, Thomas Guy . . . discounted the tickets of needy seamen for cash."*<sup>99</sup>

There was already in existence a large market for government debt in England. This was the answer to the Bank of England's problem, complemented issue of notes and shares. Ultimately, out of the £1.2 million loan facility<sup>100</sup>, only 60% was called upon by the Government (and out of this, 1/7 was on a 'promise to pay' basis). The stock was a huge success, and the up-take was high.

This was a much better way, as far as the Government was concerned anyway, to borrow money than to flood the market with fresh tallies. Tallies were indeed struck for the new deal, but were merely stored by the Bank in their 'Fund of Credit', and not released to the market.

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<sup>97</sup> Ibid. at p.27

<sup>98</sup> Ibid. at p.28

<sup>99</sup> Ibid. p. 26

<sup>100</sup> Op. Cit. at 4

Of course, this was not a one sided gesture, and in return for this loan, the Bank was incorporated as: “The Governor and Company of the Bank of England”. Parliament passed an Act to fully effect this deal in 1694, the so called ‘Bank of England Act’ although perhaps more properly called ‘The Tunnage Act’<sup>101</sup>. The deal was fully implemented on the 27<sup>th</sup> of July 1694, with the sealing of the Royal Charter.

Of course, with such an attractive market opening up, it would not be long before competitors arrived on the market. And they did, with the advent of the South Sea Company and the Sword Blade Company.

Naturally, the Bank of England did not take such competition (or even the potential threat of competition) lightly, and in 1697 the following passage entered the statute books:

*“During the continuance of the Corporation of the Governor and Company of the Bank of England, no other Bank, or any other corporation, society, fellowship, company, or constitution in the nature of a bank shall be erected, established, permitted, suffered, countenanced, or allowed by Act of Parliament within this Kingdom.”*<sup>102</sup>

This is very much in keeping with the ‘rent-seeking’, monopolistic tendencies of the earlier chartered-trading corporations, and shows a sharp difference from the modern staunchly anti-monopolistic tendencies of both the Government and the markets themselves.

### **The Sword Blade Company**

The Sword Blade Company was founded in 1691 for the purpose of ‘importing’ Huguenot sword smiths from France to meet demand for the new ‘hollow blade’ sword. The charter created the ‘The Governor and Company for Making Hollow Blades in the North of England’, it awarded them: “Perpetual succession, the right to hold land, a common seal, a personality to sue and be sued, and the power to issue stock”<sup>103</sup>. It is not however, for its original purpose that the Sword Blade Company was utilised in the fullness of time.

By 1700, the company had changed hands and achieved its first financial ‘break’ in around 1702. Empowered by their charter to hold land, they became voracious in their purchase of land

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<sup>101</sup> “An Act for granting to their Majesties several Rates and Duties upon Tunnage of Ships and Vessels, and upon Beer, Ale, and other Liquors, for securing certain Recompences and Advantages in the said Act mentioned, to such Persons as shall voluntarily advance the Sum of Fifteen hundred thousand Pounds towards carrying on the War against France.” (5 & 6 Will. & Mar. c. 20)

<sup>102</sup> “The Engraftment Act” 1697, (8 and 9 Will. III, cap. 20.)

<sup>103</sup> Op.Cit. 1 at p. 60



confiscated from the Jacobites in Ireland and auctioned off by the Government. The figure put on this land was a rental value of around £20,000 for a price of £200,000, a bargain!

In order to finance these purchases the Sword Blade began issuing stock (again, allowed under its charter). However, similar to the Bank of England, it was not cash that the company wanted, but Government debt, in this case, specifically Army debentures. Again, all three parties in the deal would benefit.

The buyers of stock would sell their debentures (standing at 85 on the market due to discount) for stock in the Sword Blade (standing at 100). Therefore the buyers had benefited. The Sword Blade itself benefited by purchasing debentures at low prices before the offer was made, and then offloading them as soon as the price rose due to their own offer of stock. The promoter had benefited.

Not to be left out the government itself benefited hugely. The Government received, in exchange for its land (for which it had no real use), its own debt in return, which it could then cancel. This is estimated to have saved it in the region of £15,000 a year in interest payments and charges. On top of this, in order to 'okay' the deal, the government insisted upon a loan from the company of £20,000 at an interest rate of 5% using Royal tin as security. It is estimated by Carswell that the basis for the size of this loan was that it approximated to the private profit made by the syndicate running the Sword Blade.<sup>104</sup>

As a result of this interest in Tin and Land, the company began to act as a 'land-banker'. To quote Carswell:

*"On the strength of their fund of credit in land and tin, they were granting mortgages to other purchasers of Irish land, accepting deposits, discounting bills and (shock horror!) even issuing notes"*<sup>105</sup>

Naturally, this came to the attention of the Bank of England, jealous of its monopoly as banker to the nation. In spring 1704, the Bank of England instructed the Treasury, that, in its opinion, its monopoly (as laid out by the Engraftment Act) was being unlawfully infringed.

This put the Treasury in the un-enviable position of having either to be seen to break the law, or to put itself massively out of pocket if it sided with the Bank. Luckily, the 'names' behind the

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<sup>104</sup> Carswell, J., Op. Cit. p. 36

<sup>105</sup> Ibid.

Sword Blade<sup>106</sup> had already considered the impact of the legal monopoly of the Bank of England, and using the language which remains to this day almost the exclusive preserve of the lawyer averted potential catastrophe. The 1697 Act<sup>107</sup> was quite specific that it prevented the existence of a bank acting under the authority of an Act of Parliament; the Sword Blade Company did not. It acted purely under a Royal Charter.

Technically, all joint-stock companies required an Act of Parliament, and indeed one had been prepared as early as 1691, but was never passed. This conflict lasted between the three parties until May 1707, when the Bank managed to extract a promise from the Exchequer that it would honour the spirit of its earlier agreement, and seek both to clamp down on the Sword Blade and to 'beef-up' the legislation protecting the Bank of England from interlopers. From a constitutional point of view, the draftsmen had clearly never heard of the concept of parliamentary supremacy, and the inability for any parliament to bind itself, which of course is what the 1697 Engraftment Act<sup>108</sup> was attempting to do, tie the hands of Parliament to ensure the economic and commercial supremacy of the Bank of England.

The reason for such a concession from the Treasury can, again, be summed up by Carswell:

*"(The Bank) had financed the Union with Scotland, and their directors had been prominent in raising for Marlborough's ally, Prince Eugene, the first loan to a foreign government ever floated on the London market. Their existing charter had only a further three years to run, and in return for its renewal for another twelve years they were offering to lend the government a million and a quarter at 5%."*<sup>109</sup>

In spite of the Sword Blade offering a rate of 4%, the Bank finally won through, having increased its loan offer to £1.5 million and lowering its rates to 4.5%. In addition to this, their charter was renewed until 1732 (far longer than the expected 12 years), and the Government enacted the following legislation:

*"(it is illegal for) any body politic or corporate whatsoever, erected or to be erected other than the said Governor and Company of the Bank of England) or for any other persons whatsoever united or to be united in covenants or partnerships exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or*

<sup>106</sup> A reading of Carswell as a whole text illustrates the point that the power behind differing companies were often important political players in different parties (either the Tories or the Whigs), arguably these companies were little more than economic extensions of these political entities.

<sup>107</sup> "The Engraftment Act" 1697, (8 and 9 Will. III, cap. 20.)

<sup>108</sup> Establishing the rights of the Bank of England in perpetuity as the only 'bank' in England.

<sup>109</sup> Op. Cit. at 10

*sums of money on their bills or notes, payable at demand, or at any less time than months from the borrowing thereof.*"<sup>110</sup>

This put an unequivocal end to the banking activities of the Sword Blade Company. Certainly until a Government arrived that was hostile to the Bank, and there were plenty of men, both from Parliament and the City who were. Similarly, it illustrates the level of protection that Chartered Corporations could expect to receive from a benevolent (at least subjectively speaking) government. The thought of such legislation today would clearly be totally unthinkable!

### **The South Sea Company**

This chapter will only provide a very basic overview of the creation and very early years of the South Sea Company. A more proper place for discussion would seem to be the next chapter dealing with the South Sea Bubble and its bursting. Attempting to artificially separate the two sections would I feel lead to some degree of confusion and near-constant flipping from chapter to chapter to verify facts, figures and dates. On that basis, I am sure the reader will forgive me if, in the next chapter, I am occasionally guilty of some repetition.

Similarly to the Sword Blade Company, the South Sea Company was *prima facie* formed for a very different purpose than that of high finance to the Government, unlike the Sword Blade however, the South Sea Company only engaged in 'alternative' trade in order to facilitate its banking business, and to circumvent the proscription on institutions other than the Bank of England acting in such a capacity.

Founded in 1711<sup>111</sup>, the company was awarded a monopoly over trade with the South American colonies of the Spanish Crown under the terms of a treaty during the War of Spanish Succession (1701-1714). In return for this grant, the company was expected to assume a portion of the national debt incurred during the war. This is where the first problem arose, as due to the monopoly granted previously to the Bank of England, the South Sea Company could not be, *prima facie*, a bank.

In return for the trading rights, the company undertook to exchange £10 million pounds of Government short-term debt (in this case, annuities) for shares in the newly formed company. In return for this, the company was awarded an annuity equivalent to around 6% of the debt exchanged. This not only gave the new company a very healthy (£600,000 or over £45,000,000 in

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<sup>110</sup> 6 Anne. Cap. 22

<sup>111</sup> Op. Cit. at 10, p. 5

2011 prices) revenue stream from the off, but the Government reasoned it could create this money through the imposition of levies on imports from South America.

As with other debt conversion schemes, the Government was happy as it could reduce its interest rates, and those redeeming the debt were happy to be 'in on the ground' with a new fresh company. Initially those with shares in the company would have been incredibly happy, as between late 1719 and early 1720 the price of the shares rose by an astonishing 820%!

Again in 1717, the company took on more Government debt, this time to the tune of £2 million pounds. The scheme was the same as before: a swap of short-term annuity debt from the Government for shares in the South Sea Company. The company alone now owned more than 20% of all Government debt.

An interesting aspect to the behaviour of the company is that of 'quantitative easing', the effective creation of wealth with which to purchase government debt.<sup>112</sup> In simple terms, the company actually financed its own purchase. It allowed prospective investors to borrow the cost of purchasing their shares from the company itself!

*"The South Sea Company had no real business so its shares had no value, save for the cash raised by their issue. The scheme could "work" only if investors could be persuaded to drive the stock above its par value—to create wealth out of thin air.*

...

*At first the scheme seemed to work. New issues of South Sea shares, which had a par value of £100, were sold for £300, £400 and finally £1,000. Speculators were allowed to buy shares on margin and could even borrow from the company to do so. Since investors did not have to hand over cash, but ended up with an asset they could use to buy goods, this was, in effect, a case of money creation."<sup>113</sup>*

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<sup>112</sup> Quantitative Easing is a notoriously complex economic concept (and not merely 'printing' money) and after a number of attempts to provide a succinct and concise description of the nuances, the author came to the conclusion that it would be worthy of a thesis in itself. For the purposes of this work, QE is the basic creation of wealth to purchase debt.

<sup>113</sup> Buttonwood, "South Sea QE: An Early Attempt to Buy Government Debt by Creating Money", The Economist, Nov. 11<sup>th</sup> 2010, <http://www.economist.com/node/17465313>

In 1713 in the Treaty of Utrecht, in a seeming 'sop' to the bank of England, the company was awarded further trading rights in South America; the ability to send one trading ship per year to the colonies and the *Asiento*, or right to transport slaves from Africa.

From here on in, the next chapter will deal with the battle between the South Sea Company and the Bank of England to control even larger proportions of Government debt.

### **Corporate Governance**

At this point, and before we take the leap into the high finance and chaos of 'The Bubble', it would seem appropriate to provide an overview of corporate governance in this period, in order, later on in this work, to analyse if any themes remain constant in contemporary companies' law. The early 20<sup>th</sup> Century scholar DuBois gives us the following introduction to the topic, addressing the early 18<sup>th</sup> Century:

*"The typical structure was as follows: There was an assembly of proprietors, the general court ... and a court of directors or assistants, the executive power, elected by the general court and presided over by the governor and sub-governor. Details of administration were carried out by committees of directors, whose appointment was generally left to the directors. While charters, acts of incorporation, and deeds of settlement were mainly concerned with defining the respective spheres of these groups, nevertheless, practice varied in detail from organization to organization, and the line of demarcation was not rigidly defined. The general courts were as a rule summoned by the directors of the companies concerned. Generally, the charter or articles of association would prescribe a minimum of stated courts each year, and provision was frequently made for the summoning of courts at the request of a certain number of proprietors who possessed a requisite amount of stock."*<sup>114</sup>

The term 'director' was a new affectation of the Bank of England, adopted from Europe.

Previously to this the correct term would have been the rather more grand title of: "A chief of the Court of Committees". At this stage in history high finance was seen primarily as a European concept, and so it is only to be expected that the Bank would adopt current industry parlance.

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<sup>114</sup> DuBois, A.B., *The English Business Company after the Bubble Act 1720-1800*, J. Goebel ed., 1938, The Common Wealth Fund, pp.287-288

There are a number of similarities between the *prima facie* style of corporate governance engaged in in this period of time, and what we are used to seeing now, in modern public companies. There are also a number of differences. For example, in the charter of the Bank of England there were a number of qualifications for being a director that do not exist today, e.g. ownership of a specified level of stock. These qualifications are expanded upon by the London Encyclopaedia:

*“The Bank of England being established, the charter directed that its management should be vested in a governor, deputy governor, and twenty-four directors, to be elected by the holders of the stock, a clear possession of £500 of which for six months constitutes a qualification to vote, the qualification of a director being the possession of £2000 of the stock, of a deputy governor, £3000 of stock and of a governor £4000 of stock.”<sup>115</sup>*

Again, this should hardly be considered a surprising thing for the Bank of England to do. At this stage, the concept of ‘professional’ managers was (if existent at all) incredibly embryonic, and there was precious little separation between ownership and control. Clearly it would be impossible to have a board of directors, potentially, comprised of all the stock-holders.

This period was that in which the government relied more upon companies than any other time in history. What had begun as begrudging grants of sovereignty to small, regional trading outfits was now a collection of organisations without which the country would have gone bankrupt. In the next chapter I shall analyse how such *laissez-faire* reliance on such companies would prove a huge mistake, and the resulting legislative backlash would stunt commercial growth in the kingdom for over 100 years.

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<sup>115</sup> London Encyclopaedia, “History of the Rise, Progress and Present State of Banking in all parts of the World”, p.469

## **Chapter FIVE – The Bubble Act 1720 – Background and Effect**

Where did it all go wrong for the South Sea Company, and by association the Country? And perhaps more pertinently, why did it go as wrong as it did, as fast as it did? Even in recent times this bursting was considered anomalous. To quote Carswell:

*“The South Sea Bubble is treated as a grotesque incident, a kind of fantastic outcrop on the smiling landscape of the Age of Reason”<sup>116</sup>*

However Chalmers writing in 1794<sup>117</sup> commented upon the limited impact that the bursting of the bubble had on domestic financial systems in the 1720's. There is no final agreement by academics on the exact fallout of the bursting of the bubble. In this chapter however we shall align ourselves firmly in the 'epoch-changing' camp. This however is clearly a relatively subjectively interpreted phenomenon!

In order to fully understand the impact of the Bubble Act, it is important to understand the phenomenon that went before it, and lead, some would say very unfairly, to its draconian tone and misplaced ire. Similarly, I feel it would be useful to provide a list of Ferguson's 'Five Stages' of a bubble in order for the reader to follow their progression through this period:

- i) *Displacement*: Some change in economic circumstances creates new and profitable opportunities for certain companies.
- ii) *Euphoria* (or overtrading): A feedback process sets in whereby rising expected profits lead to rapid growth in share prices.
- iii) *Mania* (or bubble): The prospect of easy capital gains attracts first-time investors and swindlers eager to mulct them of their money.
- iv) *Distress*: The insiders discern that expected profits cannot possibly justify the now exorbitant price of the shares and begin to take profits by selling.
- v) *Revulsion* (or discredit): As share prices fall, the outsiders all stampede for the exits, causing the bubble to burst altogether.<sup>118</sup>

<sup>116</sup> Carswell, J., *“The South Sea Bubble”*, preface, p. v

<sup>117</sup> Hoppit, J., *“Financial Crises in Eighteenth-Century England”*, *Economic History Review*, (1986), 1, p. 39

<sup>118</sup> Ferguson, N., *“The Ascent of Money”*, pp. 122-123. Authors bases this list on: Kindleburger, C.P., *“Manias, Panics and Crashes: A History of Financial Crises”*, pp. 12-16. The 'new' technology bubble in the United States (IPO's of companies such as Facebook, Skype and so on) can, at the time of writing, be considered to have reached the second stage in this progression:  
[http://www.economist.com/node/18681576?story\\_id=18681576](http://www.economist.com/node/18681576?story_id=18681576)

### **The Mississippi Bubble (The bankrupting of France)**

It is not an unreasonable conclusion to come to, in spite of naysayers such as Chalmers (see above.), to state that the bursting of the South Sea Bubble was part of a (possibly the first) global financial crisis, and it was caused in much the same way that the recent crisis was, by bankers not fully understanding, or being able to control, the financial chimera which they had created. Before the bursting of the bubble in England, France had already suffered a huge financial shock of its own, and it is perhaps easier to understand the English bubble if we first look at the French 'Mississippi' Bubble. This financial debacle can firmly be laid at the feet of John Law. Law was a Scots banker and economist with, arguably, ideas well ahead of his time that undeniably built the foundations of modern banking and finance, those of paper money, central banking and the theory of monetary exchange.<sup>119</sup>

The best and most succinct explanation I have so far discovered of the occurrences *à Français*, occur in the most unlikely of books, the humorous (yet no doubt comprehensive) history of Anglo-French relations, '1000 Years of Annoying the French' by Stephen Clarke. Apologies for the length of the following extracts, but the clarity of the analysis speaks for itself. Clarke describes the incident as follows:

*"In 1716 Law was allowed to launch the Banque Generale, which began to issue banknotes, the value of which was backed up with a supply of royal gold and silver. The bank was such a raging success that in 1718 its name was changed to the Banque Royale, the ultimate seal of approval. By this time though, it was issuing far more notes than it could honour with gold or silver, and confidence in its reputation was only kept high by the Duke's very public support for the scheme"*<sup>120</sup>

Due to the runaway success of this scheme, which Law reasoned made money far more likely to be spent rather than merely stored as French Aristocrats of the time were notorious for doing, as a result of this, circulation would increase and France would again achieve wealth as a Nation. Furthermore as a result of this, the personal credibility of John Law rose exponentially, and allowed him to engage in the world of trading and colonisation, which in England of course was being undertaken by the great Chartered Companies of the day<sup>121</sup>, and as shall be illustrated below.

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<sup>119</sup> By this I mean that he reasoned that money itself has no intrinsic value it is only a means of exchange, a 'middleman' to trade.

<sup>120</sup> The Duc d'Orleans, the regent for Louis XV.

<sup>121</sup> Along, of course, with banking.



Law created the 'Compagnie d'Occident', and due to his influence at the French Court, was given the sole trading rights between France and the French colony of Louisiane in North America. Simultaneously, this company began to purchase large amounts of land near the Mississippi River, for incredibly low prices, this was a purely speculative move on the part of Law, but his involvement and reputation guaranteed a healthy market in the shares of the *compagnie*, on which Law took a 4% purchase commission. Clarke describes what happened next:

*"On the strength of this success, Law was given control of all the other colonial compagnies dealing with Africa, China and India, and in 1719 he merged them into the optimistically named Compagnie perpetuelle des Indes Orientale. Cleverly, he fixed a new share price, obliging investors to give four old shares to acquire one new one, and justified this massive inflation by exaggerating the imminent riches to be had in these undeveloped continents: gold, diamonds, timber, furs and spices, not forgetting cod."*<sup>122</sup>

On the back of this success, Law merged the *compagnie* and the *banque*, became the 'Controleur general des finances' for France and lent over one billion livres to the state (all in paper money). Clarke tells us that in one 3 month period, the capital return on the company was 4,000%. At this point, the bubble had reached the peak of its inflation.

Perhaps, not unreasonably, at this point some investors decided to 'cash-in' their investment and began to sell their shares. Unfortunately, at the same time, some customers decided they wanted to exchange their 'Banque Generale' notes for more substantial gold and silver. The problem arose when it was discovered that the bank had over 1 billion livres worth of notes in circulation, but only 330 million livres worth of precious metal as security<sup>123</sup>. As a result of these simultaneous runs, the company collapsed, making more than 1,000,000 French families penniless, leaving them with nothing more than worthless notes and share-certificates<sup>124</sup>.

### **England's Bubble**

Whilst this scenario played out in France, England was engaged in similar, although arguably far more endemic behaviour. The key player in this was the South Sea Company, although it would be unfair to lay the blame entirely at their feet.

The behaviour of the South Sea Company has been laid out in the previous chapter, and I shall not repeat myself here. But I shall attempt to provide illustration of the smaller 'bubble' companies that can be held at least partially responsible for the Act.

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<sup>122</sup> Clarke, S., '1000 Years of Annoying the French', p.200

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

Between October 1719 and July 1720, the share market jumped dramatically, with the large corporations posting huge increases in value; Bank of England 170%, East India Company 220% and the South Sea Company 820%<sup>125</sup>. Along with this, there was also a huge influx of new entrants to the market, many not bothering to apply for charters or acts of incorporation, but merely opening subscription books, and collecting deposits and payments. Such companies were arguably illegal under the Common Law of the time, for breaching the King's prerogative.

Cashing in on the huge interest and enthusiasm for stocks, people began to be reckless in their investments, investing even in a company that advertised itself as follows: *"a company for carrying out an undertaking of great advantage, but nobody to know what it is"*. The huge number of such companies entering the market was part of the problem. But, as in France under Law's system, there was not just a company component to the crash, but a monetary one as well. Certainly by this stage we can easily track the progress of Ferguson's 5 stages of the bubble.

At the same time, the moneyed companies were engaging in novel methods of making money from financing and re-financing the State. This had become an attractive option for large companies since the creation in 1688 of a parliament backed national debt, and not the legally dubious debt of the Royal Court itself. Without such a development, it would not have been possible for England to expand and finance its ever-growing domestic and international expenditure.

By 1719, both the Bank of England and the South Sea Company were in competition to assist the Government in its ambitions to redeem its debt and convert it into lower rate debt to the company.

In 1720, Parliament accepted the South Sea Company's offer that it would convert further debts of the government to shares in the company (i.e. creditors would exchange their credit for shares in the company) for a value to be determined 'as the scheme unfolded'. In this scheme, all three parties would benefit. The public creditors benefitted by the receipt of shares in a company that was undergoing a stratospheric (although not quite in the league of Law's French companies!) rise in profits and value, the government benefitted by massively reducing the cost of servicing the debt and through the receipt of £7.5 million from the company as payment for the privilege of performing the conversion and finally the company through both the conversion ratio

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<sup>125</sup> Harris, R. "Industrializing English law: entrepreneurship and business organization, 1720-1844", p. 57

of shares to bonds, and through the plan to issue more shares to the public, buoyed by the new deal.

Although not identical to the *Banque Royale* scheme, there are undoubtedly clear parallels to be seen. The whole financial scheme was enacted by the South Sea Act 1720. Now the South Sea Company owned 23.4% of the national debt. It had become a 'player' to use the vernacular.

In order to further inflate the share price of the company, it engaged in spreading 'the most extravagant rumours', it bribed members of Parliament, Ministers and those close to the King. The price rose tenfold to over £1000 per share by August 1720 (see below, Fig. 5.1).

*"As the shares soared London indulged in a bout of speculative enthusiasm. The nouveaux riches paraded their wealth in the form of luxurious coaches and jewellery. Confidence in the company was high since it was regarded as virtually an arm of the administration: King George I was its governor (yes, he was Governor King).*

...

*At the time nobody described the scheme as a monetary stimulus. But the general euphoria that followed the rise in the company's share price induced what might be called a "wealth effect" among the British. They seized the chance to invest in other companies that ingenious promoters brought to their attention."*<sup>126</sup>

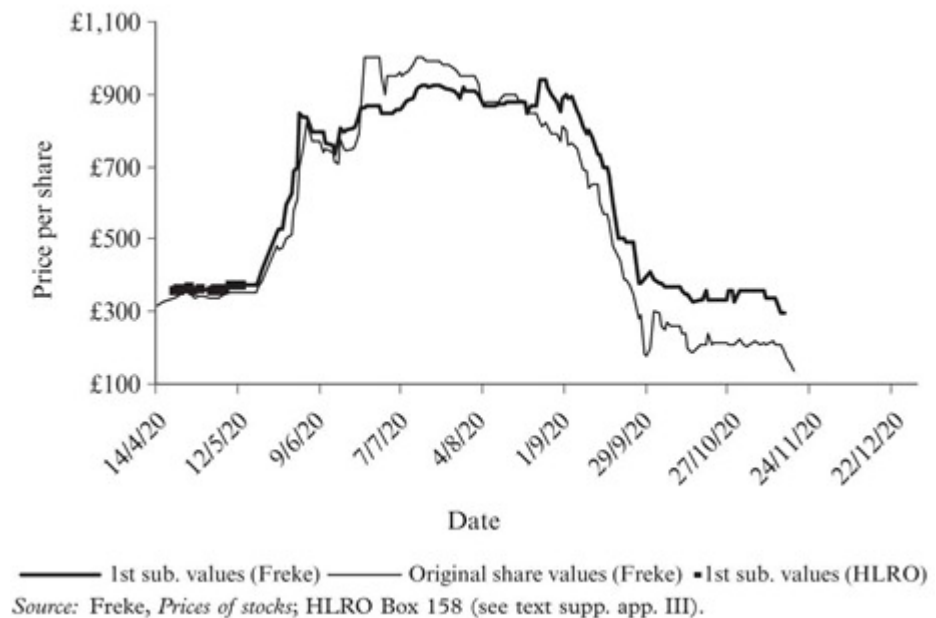
This is clearly illustrative of *Mania*.

Then the bubble burst. In the space of a few short months, the price of shares dropped back to £150, and later (but not much later) £100. As people began to cash in their shares, the price dropped due to basic rules of economic supply and demand. As price fell, people began to short-sell (selling stocks one does not own, in the hope of purchasing them back later at a lower price), and as the price fell further, more people decided to 'get out'. A vicious cycle began and the price crashed even faster than it had risen. It was France all over again, and people were ruined. The knock-on effects of this crash were severe, with bankers and goldsmiths unable to collect on monies lent for the purchase of the stocks. Welcome to the final stage of Ferguson's 5-stage description, this was truly *Revulsion*.

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<sup>126</sup> Buttonwood, "South Sea QE: An Early Attempt to Buy Government Debt by Creating Money", The Economist, Nov. 11<sup>th</sup> 2010, <http://www.economist.com/node/17465313>

The below illustration should provide some graphic example of the loss engendered when the bubble burst. The graph also shows quite neatly the rampant self-over-valuation of the company from September 1720 onwards. No matter how much the company reduced the subscription rate, the price was falling much further, much faster:



**Fig. 5.1 – A graph illustrating the value of South Sea Stock in 1720, both in actual terms and in terms of subscription cost.<sup>127</sup>**

To some extent, the bursting of the bubble is not relevant to the purposes of this thesis, it only illustrates the point that corruption and fraudulent behaviour existed at the time, and that regulation was needed, such regulation however does not fall within the remit of this work. It is the Act itself that interests us, and that had the lasting effects upon the English commercial landscape.

Before we move onto an analysis of the Act itself, this would seem like an appropriate time to draw parallels between the South Sea Bubble and the recent Dot-Com Bubble of the early 21<sup>st</sup> Century. As this is a slight aside to the main work, the following quote will, I hope, suffice to illustrate:

*“Persistent stock-price increases that have a questionable link to a firm's fundamentals are often portrayed as irrational bubbles. While the recent performance of Internet stocks*

<sup>127</sup> Reproduced (with minor alterations) from: Shea, G.S., “Financial Market Analysis Can Go Mad (In the Search for irrational behaviour during the South Sea Bubble)”, *Economic History Review*, 2007, vo. 60, 4, p.650

*is the latest example, the South Sea Bubble in 1720 is often exemplified as the epitome of the irrational equity bubble. Some criticism of Internet investors has suggested that they behave irrationally and ignore fundamentals; that criticism occasionally draws comparisons between on-line investors and participants in the South Sea Bubble, an investment scheme in which, it is typically assumed, investor behaviour was irrational and unsophisticated.”<sup>128</sup>*

As adaptable as humans are to their environment, it seems that when it comes to making a ‘quick-buck’ we will never learn, not even the best and brightest:

*“History has characterised the South Sea bubble as obvious folly, even though the scheme was complex enough to deceive Sir Isaac Newton, who lost money when it collapsed. He lamented: ‘I can calculate the motions of heavenly bodies, but not the madness of people.’”<sup>129</sup>*

### **The Act – Not many people know that....**

Firstly, it would seem appropriate to address a common misconception, that that the Bubble Act was a response, or at the very least was connected to, the Bubble itself. Not so. The Act was designed to suppress the small bubble companies that had hitched a ride on the coat-tails of their larger, more influential, brethren. As to the South Sea Bubble itself, the Act assisted in its expansion and ultimate explosion.

1720 can be considered one of the most important years in respect both of chartered corporations in particular, and the law of companies more generally. It marked a desperate attempt by the larger chartered companies for their position at the apex of the corporate hierarchy, and a desperate low-point for all non-chartered joint-stock enterprises. To quote Harris,

*“The Bubble Act is normally viewed as a watershed in the history of the unincorporated joint-stock company”, from a status of recognition, popularity, and appreciation in the years 1689 – 1720 to one of mistrust and eclipse after 1720.”<sup>130</sup>*

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<sup>128</sup> Harrison, P., *“Rational Equity Valuation at the time of the South Sea Bubble”*, 2000, History of Political Economy, 33.2, 269-281

<sup>129</sup> Buttonwood, Op. Cit.

<sup>130</sup> Harris, R. *“Industrializing English law : entrepreneurship and business organization, 1720-1844”*, 2000, pp. 60-61

1720 was the year that saw the introduction of the infamous Bubble Act<sup>131</sup>, a piece of legislation that would have severe effects upon the state of corporate law in Great Britain for over 100 years. The act was a response to the perceived meteoric rise in non-chartered (and thus unregulated) joint-stock companies, and not to regulate the well-established and seemingly 'respectable' chartered companies. Although there are many possible explanations for it, there are 3 views in particular that seem to hold water. Ron Harris in his 1994 paper on the issue identifies these views as follows, firstly:

*" . . . [It] is the view most commonly held and most often quoted in textbooks and thus can be considered the orthodoxy on this issue. According to this explanation, the act reflected hostility to speculation in the stock market and to joint-stock companies in general and attempted to limit both."*<sup>132</sup>

Secondly:

*" . . . the legislators, as an interest group, transact in the market of legislative privileges with privilege-seeking entrepreneurs. More specifically, in the case of the BA [Bubble Act], the government or Parliament "intended to prevent non-chartered firms from using the formal market," and they did so . . . to "enhance the importance of charters" and to protect their ability "to raise revenue through the issuance of charters."*<sup>133</sup>

And thirdly:

*" . . . the South Sea Company (SSC) initiated the BA because it believed that the wave of small bubbles competed with the company's conversion scheme and could endanger the blowing of its own bubble. According to this view, the act was an attempt to hinder alternative investment opportunities and to divert more capital to South Sea shares."*<sup>134</sup>

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<sup>131</sup> An Act for better securing certain Powers and Privileges, intended to be granted by His Majesty by Two Charters, for Assurance of Ships and Merchandize at Sea, and for lending Money upon Bottomry; and for restraining several extravagant and unwarrantable Practices therein mentioned (6 Geo I, c 18). Also known as: 'The London Exchange and Royal Assurance Corporation Act' and 'The Bubble Act'.

<sup>132</sup> Harris, R., *The Bubble Act: Its Passage and Its Effects on Business Organisation*, Journal of Economic History, 1994 54, no. 3, 611

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

Bearing in mind the circumstances surrounding the Act, all three of these explanations are easily plausible, and it is quite probable that they all had an influence over the creation and passing of this Act. This can be explained simply by ‘human nature’.

To address the first point, this is an entirely natural view for Parliament to have held at the time, such widespread investment was taking value out of the land and increasing the wealth of the middle classes. At a time when Parliament (in both Houses) was dominated by the landed gentry and the aristocracy, this would be anathema to them.

The second point is a general one of self-preservation, combined with the economic phenomenon of ‘rent-seeking’. Why would parliament deprive itself (and, for that matter, the Crown) of income and power over the creation of companies?

The third point is easily explicable by the presence of large amounts of South Sea Company ‘placemen’ within both Houses of parliament, both directors and those in the more general employ of the company.

When one combines these three factors, and the further fact that the seminal tract on free-market economics was not written for nearly another 60 years<sup>135</sup>, it is easy to see why the Bubble Act passed Parliament. It is very easy, from a 21<sup>st</sup> Century perspective to dismiss out of hand the Act as a monstrous restraint of trade, a knee-jerk reaction to a potentially non-existent problem and a form of protectionism for the most well-off in society, but this would be to completely ignore the attitudes and pressures of the day.

What is beyond controversy, are the ramifications of this Act, stifling, as it did, the growth of entrepreneurial capitalism completely until over 100 years later. To illustrate the severity of the measure, and to preclude any accusations of exaggeration, one need only look at the text of the Act in Section 18:

*“All undertakings . . . presuming to act as a corporate body . . . raising ... transferable stock . . . transferring . . . shares in such stock . . . without legal authority, either by Act of Parliament, or by any Charter from the Crown, . . . and acting . . . under any charter . . . for raising a capital stock . . . not intended . . . by such Charter . . . and all acting . . . under any obsolete Charter . . . for ever be deemed to be illegal and void.”<sup>136</sup>*

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<sup>135</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776.

<sup>136</sup> (6 Geo I, c 18) S.18

It should be plain from this excerpt from the act just how serious a matter this was, without a charter, one could not engage in joint-stock trade, and as such, not benefit from the legal protection such a status offered.

### **“News Just In – Breathing Legalised” - A Legal Solution to a Non-Existent Problem?**

Before moving on to look at the substantive changes engendered by the Acts of the 1840's, 50's and 60's and the flow of resultant case law, it might be worthwhile looking in more detail at whether or not, with the benefit of hindsight, such changes were needed at all, in spite of the existence of the Bubble Act.

Initially, I had no intent of including a chapter of this nature in this work, I assumed at the start (and continued with this belief throughout much of the research) that these changes were made for obvious reasons, and any effort to explain this in too minute a detail would be futile and insulting to the intelligence of the reader. However, on further research, there is a body of thought (albeit a small one) that maintains that the development and use of unincorporated corporate form was moving along very nicely indeed, well before the 'landmark' Acts of the mid-19<sup>th</sup> Century, and even under the nose of the Bubble Act 1720. These academics claim that the creation of the new easily accessible corporate form by the State in fact made very little practical difference to the pre-existing commercial form.

In spite of the many and varied differences between charters and overarching statutory acts (and their arguable usefulness), it is clear that the latter seemed to provide great impetus to economic and commercial growth within the United Kingdom. The correlation between these two factors however has come under close academic scrutiny. A common 'first-glance' view can be summed up as follows:

*“The conventional wisdom regarding the emergence and spread of the corporation holds that this development was a function of certain necessary legal innovations provided by government, i.e., by legislation and court decisions. Inappropriate legal institutions represented a bottleneck which required government action to uncork. For example, Shannon asserts that:*



‘... before the legal changes of 1844 and 1853 [referring to Parliamentary legislation in those years], English law virtually prohibited joint-stock enterprise for ordinary trading and manufacturing purposes.’<sup>137</sup>

*In fact, corporate status was held to be a privilege awarded (and hence revocable) only by government.*”<sup>138</sup>

This is a relatively logical thought progression (something flourishes when allowed to), but one that is vehemently denounced by Anderson and Tollison in their 1983 article, *‘The Myth of the Corporation as a Creation of the State’*. They argue that the presence of such restrictive legislation as the Bubble Act 1720 did not deter the sub-legal development of firms, operating under a number of ruses and legal fictions. They point to the work of Du Bois to provide evidence for their assertions:

*“Despite these severe legal impediments, unincorporated joint-stock companies were increasingly numerous in England after 1720. Precise numbers of these firms are very difficult to establish. They were unregistered, and unless they became involved with government or unless they survived by chance all trace of them would have disappeared when they ceased business operations. However, in his comprehensive compilation of (approximately 180) recorded joint-stock enterprises in the eighteenth century (after 1720)<sup>139</sup>. Du Bois found that approximately half of these firms were unincorporated joint-stock companies. This is an impressive statistic when one considers that a significantly higher proportion of incorporated than unincorporated joint-stock firms would presumably have had surviving records.”<sup>140</sup>*

There are a number of flaws in their interpretation of Du Bois’ work. They are indeed correct in stating that it is far more likely that the records of incorporated companies will survive, however they fail to consider the issue of whether or not the amount of un-incorporated records remaining is due to the sheer number of unincorporated concerns in operation at the time! Even with a high existence of records from the (limited in number) incorporated firms there is every

<sup>137</sup> Shannon, H.A., *‘The Coming of General Limited Liability’*, 1931, 2 Econ. History, 267

<sup>138</sup> Anderson, G.M. & Tollison, R.D., *‘The Myth of the Corporation as a Creation of the State’*, 1983, 3, International Review of Law and Economics, 108

<sup>139</sup> Du Bois, A., *‘The English Business Company After the Bubble Act 1720-1800’*. (Octagon Books) 1971, p.216

<sup>140</sup> Ibid. at p.109-110

chance of an equally high existence of records from the innumerable unincorporated firms, as poor as the percentage of still existent records may be.

The problem with this view however is that they did operate under legal fictions, and as such often could not have recourse to the law proper. For example the right to sue and be sued as a single entity could not be possessed by unincorporated joint-stock companies:

*‘It is difficult to regulate the unincorporated society because, if it is proposed to subject it to legal liability, it is apt to dissolve into its component parts, and leave the injured person to the impossible remedy of suing a large number of persons who, individually, are not worth suing. . . .’*

As a direct result of this, unincorporated firms (to achieve the aim of being able to sue) resorted to a legal method that seems to be much back in vogue recently, that of arbitration:

*“The market adapted to this problem. Private arbitrators were used extensively both by unincorporated companies and those doing business with them. Clauses were commonly inserted in articles of association by which all disputes of the members were pledged to be decided by arbitration.”<sup>141</sup>*

Further support for this view can be gleaned from the work of Ferguson<sup>142</sup> (analysed by Hedley), looking at the necessity of legal structure for corporations:

*“Ferguson examines various cases, including the stock exchange and general merchants, to make the point that the law's enforcement of contracts was not essential for trade, and that it often got by very well without it.”<sup>143</sup>*

Such behaviour is a perfect example of a responsive, virile and adaptable market, but can it be said to compare to the situation present after the mid-19<sup>th</sup> Century where such rights were

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<sup>141</sup> Ibid. at p. 111

<sup>142</sup> Ferguson, R., “Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-19<sup>th</sup> Century England”, in Rubin, G.R. and Sugarman, D. (eds.), “Law Economy and Society: Essays in the History of English Law 1750-1914”, Oxford, 1984, 192

<sup>143</sup> Hedley, S., “The ‘Needs of Commercial Litigants’ in Nineteenth and Twentieth Century Contract Law”, 1997, The Journal of Legal History, 18: 1, 85 — 95

enshrined in law and not created *ad-hoc* by the parties concerned, and where the penalties for being an unincorporated Joint-Stock were so severe?

*“The Bubble Act (1720) provided that such unincorporated enterprises were prohibited under very heavy penalties. These penalties included forfeiture of all lands, goods, and chattels, as well as imprisonment for life for the convicted undertakers of such a company.”<sup>144</sup>*

It is my view, those of Anderson et al. carefully considered, that although some historians and lawyers may have placed undue weight on the black-letter law of the Bubble Act and the prevailing winds at the time, this is no excuse to swing the pendulum too far the other way and maintain that this was no obstacle to commercial progression and that the Acts of the mid 1800's were merely codifying fully existing practice.

It is readily accepted that non-incorporate commercial practice was evolving and finding many means (including via trusts) to implement embryonic concepts of corporate personality, however until legislatively allowed and encouraged, such growth would remain at a very basic stage under constant threat of unravelling before the courts. Only when legislation such as the Joint Stock Companies Act and the Limited Liability Act were in place could such enterprises truly flourish and reach their potential.

The volte-face performed by the law at this time may well have been in response to a growing community of unincorporated bodies, for it not to have been would be most odd indeed, but to argue it was merely codifying existing custom and practice with no ‘forward-thinking’ or enabling element to it would, I feel, be a grave mis-reading of the facts.

In the next chapter, I shall look, in more detail, exactly what happened of such import in the mid-19<sup>th</sup> Century, beginning in 1844 with the ‘Mother’ of companies law: The Joint-Stock Companies Act.

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<sup>144</sup> Du Bois, A., Op. Cit. p. 109

## **Chapter SIX – The Birth of Modern Companies (1844). The Death of the Charter?**

This chapter will deviate slightly from those preceding it, in that it will not concern itself directly with chartered institutions or companies. It shall seek to provide a rolling picture of how the method of incorporation by Charter was superseded by registration.

1844 can be seen as probably the most important year in the history of the development of the law of companies, and simultaneously as the death knell of the chartered corporation.

This was, of course, the year that saw the introduction of ‘The Joint Stock Companies Act 1844’<sup>145</sup>. Previously (as I hope preceding chapters have illustrated!) in order to become incorporated, companies required either a charter or a private act of parliament, with all the difficulties and costs involved with pursuing those routes. This Act created the ‘Registrar of Joint Stock Companies’ and also a two-stage process for the registration of concerns as companies. However, at this stage there were no provisions made for any form of limited liability. Although this was only a very small step, with the benefit of hindsight it can be seen as a highly significant one away from the *ad hoc* granting of recognisable corporate status to the modern, easily applicable system of today. Today, were I desirous of registering a company, I could do so for £18 and in the space of a few days.

In 1855, the ‘Limited Liability Act’<sup>146</sup> was passed, which gave to companies of more than 25 members the benefit of limited liability<sup>147</sup>. The singular exception to this rule, that remains in effect to this day, was that subscribers remained liable for any outstanding payments due on their shares.

Over the next 50 years, the legislation kept on coming (see below, graph 6.1) with a further 19 acts seeking to expand and refine the law concerning registered companies.

### **Political Wrangling – Economic Liberalism v. State Control**

It should be emphasised that this slow transition to further economic and commercial liberalism (e.g. limited liability, ease of incorporation, etc.) was no smooth transition from the commercial autocracy of Parliament, given new strength by the Bubble Act, to one of democratic commercial

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<sup>145</sup> 7 & 8 Vict. c.110

<sup>146</sup> 18 & 19 Vict c 133

<sup>147</sup> Excluding insurance companies, where it was already standard practice to include in contracts provisions so that individuals could not be pursued. *De jure* limited liability was not awarded to insurance companies until the Companies Act 1862 (25 & 26 Vict. c.89)

equality. Such changes as were made were hard fought on both sides, particularly with respect to the rise of limited liability.

On one side we find the, surprisingly, economically astute Courts. The following quote from Santuari illustrates the position adopted by senior jurists in the early 19<sup>th</sup> Century:

*"In . . . Buck v. Buck<sup>148</sup>, Sir James Mansfield C.J. 'nonsuited the plaintiff with leave to move to enter a verdict in his favour', thus recognising that he had a legitimate claim on the money he had paid to the defendant, which was a joint stock company. Although the case was never brought before the court, the intention of Sir James Mansfield C. J. might indicate that the transaction out of which the action arose, namely the joint stock company, was no longer to be regarded as illegal. In Rex v. Stratton<sup>149</sup>, though Lord Ellenborough stated that the judges of the Court 'were agreed upon the illegality of these associations', he did not indict the defendant."<sup>150</sup>*

The courts clearly recognised that the stringent restrictions employed in the Bubble Act had outlived their usefulness (assuming, of course, they ever had any), and as such took a very liberal approach to the indictment of un-registered (i.e. non-charter) joint stock enterprises.

Ranged against this increasing economic and commercial liberalism and *laissez-faire* attitude, we have a large proportion of members of the Houses of Parliament who *prima facie* objected on the grounds that they believed that each man should be responsible for his own actions. On the 7th August 1855 in debating the Limited Liability Act, Hansard reports Earl Grey as such:

*"It is to introduce an entirely new principle into our commercial legislation, and one which the highest authorities, both in law and in commerce, view with distrust and apprehension. It proposes to depart from the old-established maxim that all the partners are individually liable for the whole of the debts of the concern."<sup>151</sup>*

The *Law Times* went so far as to refer to the bill as a 'rogues [sic.] charter'<sup>152</sup>. And it is easy to see where the critics of limited liability were coming from. It is a relatively objectively-held concept that a man is responsible for his own actions (and depending on which school of thought you hail

<sup>148</sup> [1808] 1 Campbell 547

<sup>149</sup> R. v. Stratton (1809) 1 Camp. 549n

<sup>150</sup> Santuari, A., 'The Joint Stock Company in nineteenth century England and France: King v. Dodd and the Code de Commerce', 1993, *Journal of Legal History*, 14:1, 41

<sup>151</sup> HANSARD, *HL Deb 07 August 1855 vol 139 c 1904*

<sup>152</sup> De Koker, L., 'The Limited Liability Act of 1855', *Comp. Law*. 2005, 26(5), 130-131

from: inactions), limited liability usurps this, and seeks to limit responsibility (and, of course, liability).

The concept of limited liability was, at the time, one ripe for satire, and was a major plot point in the penultimate Gilbert and Sullivan Operetta *'Utopia, Limited'*<sup>153</sup>. One wonders whether Private Eye would have been so genteel in its comic analysis.

Even more than 10 years after the passing of the Joint Stock Companies Act, Parliament was still debating the merits of such freedom to incorporate. Take for instance this excerpt from a speech by Earl Grey in the debate on the Limited Liability Act (1855):

*"That Act required that a Joint-stock Company should have not less than three directors, who must be shareholders, and, therefore, under this Bill a Company could not consist of less than three shareholders; but there was nothing in the Bill that he could discover which required a greater number of partners than three. Thus, three persons, upon going to the registrar and declaring they had subscribed a certain amount of capital, of which a certain portion was paid up, would be at liberty to establish a Company. They might be convicts, only discharged the preceding day, after having undergone punishment. They might be persons who had failed and paid 6d. in the pound upon large liabilities, and who had been refused any certificate by the Court of Bankruptcy. . .*

*There were no means whatever of ascertaining the accuracy of the statements made by persons going to the registrar and setting up a Joint-stock Company under this Bill. Was it fit or decent that with so little authority any Company should be allowed to be established? A Company might be established by men having a large amount of capital, but who wished to employ their capital for dishonest purposes. In the metropolis a very large amount of capital was invested in the extremely dishonest trade of receiving stolen goods. The possession of wealth so little implied the possession of honesty that very possibly Companies would be formed the object of which would be to defraud and plunder the public. He wished to point out the facilities for their operations which this Bill afforded. They might embark in a very large business, either manufacturing or mercantile, carry it on with all the outward appearances of wealth and stability, pay all demands for a considerable time, divide large nominal profits, and yet the whole concern, from first to*

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<sup>153</sup> 1893

*last, might be a gigantic swindle. They might be carrying on business wholly at a loss, and obtaining, by dividends out of capital, far larger sums than they originally invested.”*<sup>154</sup>

The issue raised above by his Lordship is well founded on the facts, and clearly such ‘loopholes’ are now well and truly plugged by disqualification orders, and further tightening of companies legislation<sup>155</sup>. The question is though, was he attempting to plug the holes, or to exploit them in order to destroy the infant concept of registration in lieu of charter? Under a charter, being as it was, a specific instrument of authority, it could be couched in terms specifically designed for purpose. Similarly due to the relatively small number of chartered corporations in the country, it would not be impossible to police their operations.

Certainly as far as the House of Lords was concerned, it was a very *nouveau* concept that money could be held in stock and not in land, and they objected to the middle classes being able to enrich themselves, and at the same time (by not purchasing land) reducing the value of the estates of the nobility. The reader will note, that such a growth in the middle classes and their disposable (and growing) wealth led to the formation of the very first town guilds, very little seems to have changed in the intervening 600 years!<sup>156</sup>

To conclude this section, it would be fair to say that during the 19<sup>th</sup> Century, it was the Courts who were championing the cause of economic liberalism. Whether this was directly because the courts believed in an expanding business sector of the economy or because in terms of equity and fairness they considered the strict statutory application of acts such as the Bubble Act to be unconscionable is almost impossible to say. What however can be drawn from these contradistinctions is the fact that it was the judiciary who were, consciously or unconsciously, taking the forward-looking approach to a rapidly expanding body of law and practice in the commercial arena.

### **The impact of case law on the law of companies**

It is around this time that we begin to see case law making an important impact upon the law affecting companies, in some cases strengthening the statutory *status quo* and in others challenging it. Overall, it is perhaps correct to say that the courts added a veneer of respectability and legal sheen to the controversial concepts raised in the new companies’ legislation. In some

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<sup>154</sup> HANSARD, *HL Deb 09 August 1855 vol 139 cc2033-2034*

<sup>155</sup> For example the Company Directors Disqualification Act 1986

<sup>156</sup> See Chapter Two.

cases they seemed to ignore some of the more draconian statutory provisions *in toto*, and in others to interpret provisions in a particularly liberal, forward-thinking, commercially astute light.

Perhaps the most famous (and in the author's opinion certainly the most important) case to consider is that of **Salomon v. Salomon & Co**<sup>157</sup>. This can be considered as the case that finally established as a foundation of modern companies' law the principle of limited liability and resolutely 'lowering the corporate veil' between company and owners.

*"Though, the concept of "piercing the corporate veil" is generally invoked between the two corporations - the holding and the subsidiary companies; "separate corporate personality", nevertheless, not only entails differentiation between the two corporations but also between the corporation and its members - the shareholders. Legal reasoning has held that the corporate person is fundamentally separate from its members, whether they are individuals or companies. The principle was enshrined in the House of Lords ruling in Salomon v. Salomon & Co. (Morgan, 2002) - a legal decision so important that it has since been "treated by judges and academics alike with reverence bordering on the religious".*<sup>158</sup>

Although the facts of the case are well known, I feel them important enough to repeat here. Salomon began as a 'sole trader', i.e. a trader with unlimited liability for the debts of his business. In 1892 he decided that he desired to become a limited company under the Companies Act 1862, and in order to achieve the requisite 7 shareholders<sup>159</sup>, he gave to 6 family members 1 share each. He retained the balance of 20,001 shares in the new limited company. The cash value placed on the sale of the physical business from Salomon the sole trader to Salomon the new company was £39,000<sup>160</sup>. This price was paid £9,000 in cash, £20,000 in the shares of the new company and with a £10,000 debenture giving charges over the assets of the company to Mr. Salomon. At this point, all debts of the sole trading business were paid off in full.

As a result of the method of sale, not only was Mr. Salomon no longer personally liable for the debts of his new company, but as he possessed a debenture, should the company fail, he would

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<sup>157</sup> [1897] A.C. 22

<sup>158</sup> Singh, D., "Incorporating with fraudulent intentions: a study of various differentiating attributes of shell companies in India", 2010 Journal of Financial Crime, 17(4), 463

<sup>159</sup> S.6 CA 1862

<sup>160</sup> Or £2,335,710 in 2011 monetary terms.

(<http://www.nationalarchives.gov.uk/currency/default0.asp#mid>)



be the first creditor in line to obtain satisfaction via the assets of the company. This is the prime advantage of a debenture; you can fix your debt to certain assets of the company, either definite, concrete assets (such as property) or floating over rolling assets such as stock.

Soon after this, the company went through financial difficulties, and the debenture was sold to a third party (a Mr. Broderip). Soon after this the company was liquidated due to insolvency. However, there were not enough assets remaining to fully satisfy Mr. Broderip's debenture. As a result of this, Mr. Broderip challenged the validity of the new limited liability company and sought to make Mr. Salomon personally liable for the debts of the company, as if it were still a sole-trader concern.

The main issue for consideration by the courts was whether or not Mr. Salomon had satisfied S.6 of the 1862 Companies Act and had the necessary 7 or more subscribers to his new limited company. The Court of Appeal took the following approach, as summed up in the judgement of Kay LJ:

*"The statutes were intended to allow seven or more persons, bona fide associated for the purpose of trade, to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company"*<sup>161</sup>

It was decided that the company was a mere façade, an agent for Mr. Salomon the sole-trader and that he was solely, and personally, liable for the outstanding debts of the company to Mr. Broderip. He appealed to the House of Lords.

The judgment of the House of Lords, given in the main by Lord Halsbury, took a strict literalist approach to statutory interpretation, at odds with the 'meaning' approach adopted by the Court of Appeal:

*"Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied . . .*

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<sup>161</sup> [1895] 2 Ch. 345

*I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the share-holders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders, they are shareholders for all purposes . . .*

*I must decline to insert into that Act of Parliament limitations which are not to be found there.”<sup>162</sup>*

Thus, the ruling of the Court of Appeal was overturned. It is interesting to note that were this case decided with the benefit of the ruling in Pepper v. Hart<sup>163</sup> and the ability to look at Hansard to determine what Parliament actually meant by certain aspects of legislation. If we look at the Hansard records for the debates over the Companies Act 1862<sup>164</sup>, it is quite clear that the Court of Appeal would have been correct in their initial judgement, and the House of Lords in error. Parliament had indeed envisaged a *bona fide* interpretation of the Companies Act and as such situations according to the initial ruling of the Court of Appeal in this case.

The continuing import of this decision was summed up well in a 2007 article by Daehnert:

*“In Salomon, the House of Lords explicitly imposed the dogma of separation between legal entity and shareholder. It may also be remarked that this decision has cast a very long shadow on English company and group law. Indeed, Salomon is the starting point for each court when considering the question of whether the corporate veil should be lifted. . . The way courts do this is quite often described as “robust”, thus strictly upholding the Salomon principle.”<sup>165</sup>*

Although Daehnert is correct in his assertions at the specific time of his writing, he does not consider the pre-*Adams*<sup>166</sup> period where courts were very ready to ignore the *Salomon* rule in

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<sup>162</sup> Supra note 10. At 29-34

<sup>163</sup> *Pepper v. Hart* [1992] UKHL 3

<sup>164</sup> Hansard ‘hub’ for this Act: <http://hansard.millbanksystems.com/commons/1862/apr/10/leave-first-reading>

<sup>165</sup> Daehnert, A., “*Lifting the corporate veil: English and German perspectives on group liability*”, 2007, *International Company and Commercial Law Review (I.C.C.L.R.)*, 18(11), 393-394

<sup>166</sup> *Adams v. Cape Industries PLC* [1990] 1 Ch 433

what Dignam and Lowry call ‘the interventionist years’<sup>167</sup> between 1966 and 1989. This period was plagued with the somewhat individualistic, subjective and fact-focussed judgements of Denning M.R. in cases such as *Littlewoods Mail Order Stores v. IRC*<sup>168</sup>:

*“The doctrine laid down in Salomon’s case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.”*<sup>169</sup>

It was also Denning that first applied the ‘Single Economic Entity’ concept formulated by Professor Gower in his 1969 work ‘Modern Company Law’<sup>170</sup>, arguing that a group of companies is a *de facto* single entity and as such should be treated as one by the Courts, with no legal separation between parents and subsidiaries:

*“This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so far as to be defeated on a technical point. . . The three companies should, for present purposes, be treated as one. . .”*<sup>171</sup>

The long term importance of *Salomon* however can be illustrated by the return to strict orthodoxy by the Courts in the case of *Adams v. Cape Industries*, concerning the lifting of the veil between parent/subsidiary companies. No longer could the courts be (nor were they willing to be) so ready to lift the veil as in the case of *Re a Company*<sup>172</sup> where the Court of Appeal lifted the veil on better legal basis than ‘to achieve justice irrespective of the legal efficacy of the corporate structure’ to quote Cumming-Bruce LJ<sup>173</sup>. *Adams* was a turning away from this reckless disregard for a crucial principle of companies’ law. Fundamentally, Denning’s equitable approach (although *prima facie* laudable) has no place in a strictly precedent based system where lineage and certainty or not only legally required but commercially desired. Looking back to Chapter One and the discussion of the *lex mercatoria* and the pie-powder courts, it is quite easy to draw comparisons between the

<sup>167</sup> Dignam, A. and Lowry, J. “Company Law”, 2009

<sup>168</sup> *Littlewoods Mail Order Stores v. IRC* (1969) 1 WLR 1241, CA

<sup>169</sup> *Ibid.* at 1252

<sup>170</sup> Gower, L.C.B., “The Principles of Modern Company Law”, 1969, 3<sup>rd</sup> Edn., Stevens and Sons Ltd, London

<sup>171</sup> *D.H.N. Food Distribution (and others) v. Tower Hamlets London Borough Council* (1976) 1 WLR 852, CA at 860

<sup>172</sup> *Re a Company* (1985) 1 B.C.C. 99421

<sup>173</sup> *Ibid.* at 99424

*ad-hoc* form of ‘quick fire’ justice dispensed by those ancient bodies and the equitable judgements dispensed by Lord Denning. Neither of them seemed concerned by the constraints of precedent and only by the need for individualistic, commercially acceptable one-off judgements, with seemingly no thought (either consciously or unconsciously) for the future repercussions. The prime difference however is that the *lex mercatoria* had no concept of precedent and as such none was created, with Lord Denning however, there was such a concept which he seemed to be determined to overturn and replace with pure equity:

*‘If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice...they may find the whole edifice comes tumbling down about them’<sup>174</sup>*

Fundamentally, the three circumstances in which the court will deviate from the *Salmon* ‘mantra’ are discussed and established in *Adams v. Cape Industries*. The only circumstances in which a Court can lift the veil are:

- i) If the Court is interpreting a Statute or Document.
- ii) ‘Where special circumstances exist indicating that it [The Company] is a mere façade concealing the true facts’.
- iii) If there is evidence of an ‘agency relationship’

Even in this case, it is emphasised that these exceptions are not to be considered an initial ‘go-to’ to quote Slade L.J.:

*“save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v Salomon merely because it considers that justice so requires”.*<sup>175</sup>

Chartered Corporations were only ever awarded any of their ‘privileges’ on an *ad hoc* one-by-one basis. Now it was firmly established that every registered firm could enjoy them, a blanket provision readily applied and enforced by the Courts. Clearly such a wide-spread ‘gift’ would result in increasing amounts of legislation seeking to interpret and refine the somewhat blunt instrument of a Statute.

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<sup>174</sup> Lord Denning, *From Precedent to Precedent* (OUP, Oxford, 1959) 3.

<sup>175</sup> *Adams v. Cape Industries PLC* [1990] 1 Ch 433 at 487

### **Empirical Comparison**

Perhaps the main difference, *prima facie*, between chartered and registered companies is that the former has a fluid form of incorporation and the latter the rigid form of the relevant Company Act. I hope that this point has, to some extent, been illustrated above with the use of *Salomon*.

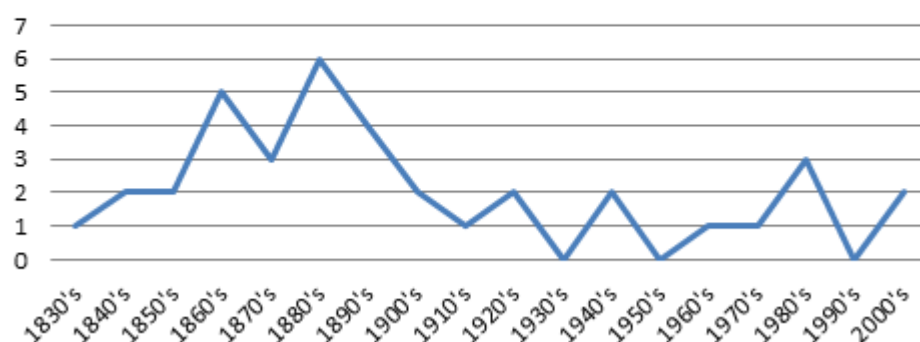
In order to incorporate a company by charter one merely needs to cover all the aspects of incorporation and running relevant for that company, but when writing a Company Act, one needs to include aspects of incorporation and running relevant to every company that may seek to use it.

The Charter of a company acts as the 'background' state-supplied legal framework, in the same way that for a registered company, the Companies Act would work. Due to the pervasive nature of Companies Acts, they can easily be considered interfering and overly invasive into the private affairs of the companies. Although arguably, as the 'eye of the State has to look over so many individual companies there is naturally less interference than one would find under a charter, more specifically tailored, yes, but under the almost constant observation and supervision of the Privy Council.

Bearing in mind the fact that Acts of parliament now need to fully encompass the activities of all imaginable companies, and that legislation tends to beget legislation, it would be reasonable to assume that the number of Statutes concerning Companies would rise at an increasing rate. Naturally Parliament will need to 'keep-up' with the rapid commercial expansion engendered by its first, tentative, steps towards liberalisation, and at the same time expand its' remit as companies become more and more diverse, specialised and adept at exploiting the loopholes present in early legislation (See above and the *bona fide* considerations in *Salomon*).

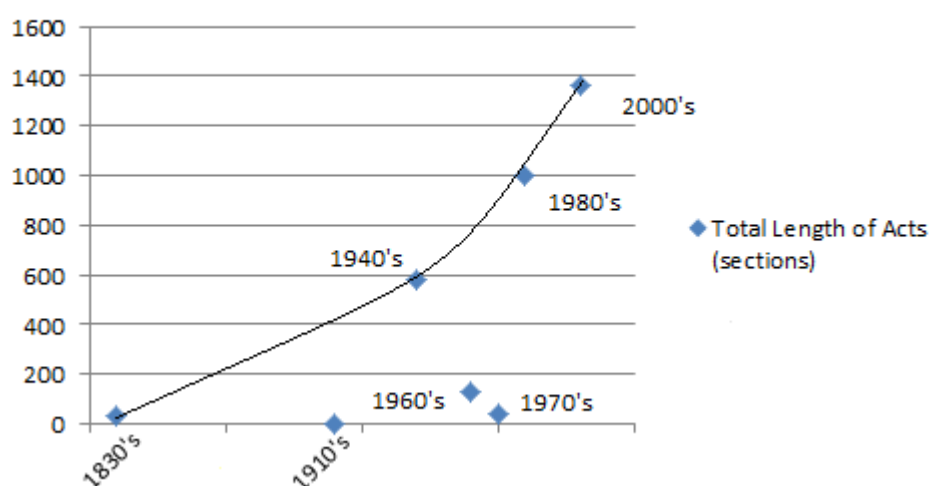
The data partially backs this up, as can be seen below in figures 6.1 and 6.2, the number of acts has remained relatively steady, with a slight downward trend, but the length of the acts (as measured by number of sections) has risen almost exponentially in the last 160 years.

### Number of Acts Concerning Companies



Graph 6.1- For list of applicable Acts, see Appendix.

### Total Length of Acts (sections)



Graph 6.2- For list of applicable Acts, see Appendix.

Hypothetically speaking, were regulated companies still not to exist, and chartering to remain the only method of incorporation, then it would be logical, *ceteris paribus*, to assume that the number of 'creating' acts (i.e. charters) would go through the roof: there are, as of March 2010, over 2 million companies registered in the UK<sup>176</sup>. In February of 2011, Companies House saw the number of registered companies rise by over 7,000<sup>177</sup> this should be compared to the number of charters awarded in the 1800's as a whole: 307. However, to make this direct comparison would be foolish, ignoring a number of salient differences between the modes of incorporation.

<sup>176</sup> <http://www.statistics.gov.uk/cci/nugget.asp?id=1238>

<sup>177</sup> <http://www.companieshouse.gov.uk/about/busRegArchive/businessRegisterStatisticsFeb2011.pdf>

### **Corporate Governance**

One aspect of chartered companies that continues to have a lasting effect upon modern registered companies, at least theoretically speaking, is that of corporate governance. This multi-faceted, ever changing concept is a peculiarly broad one, encompassing both the conservative interpretation of relations between the shareholders of the company and its directors and also the wider considerations of ownership and control.

In the early chartered corporations, ownership and control were almost inseparable. There was, as yet, no managerial class acting as a buffer between the owners of the company and the running of the company. As such, the concepts of who owned and who controlled the company were yet to fully develop and any distinctions between the two were irrelevant. They were however to prove important in the fullness of time as a comparative 'anchor', with the increasing separation between the two that arose during the 19<sup>th</sup> and early 20<sup>th</sup> centuries. Such a separation of ownership and control also proves a useful example of how Chartered corporations in the traditional sense were gradually going out of vogue;

*"The building and operating of the rail and telegraph systems called for the creation of a new type of business enterprise. The massive investment required to construct those systems and the complexities of their operations brought the separation of ownership from management. The enlarged enterprises came to be operated by teams of salaried managers who had little or no equity in the firm. The owners, numerous and scattered, were investors with neither the experience, the information, nor the time to make the myriad decisions needed to maintain a constant flow of goods, passengers and messages. Thousands of shareholders could not possibly operate a railroad or telegraph system."*<sup>178</sup>

Similarly, due to the importance of the role of the State in the creation of Chartered corporations, the corporate theories of concession and fiction were created. These theories both concentrated on the role of the state in creating the companies as a governmental (or Royal) concession and the fact that, as so created, they were a legal 'fiction' with no real existence in excess of the private parties to the company. As a result of their mode of creation, it was arguably more justifiable for the State to intervene in their conduct and behaviour<sup>179</sup>. To quote Dignam and Lowry,

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<sup>178</sup> Chandler [1990]

<sup>179</sup> Refer back to Chapter 3 to see the level of interference practiced upon the East India Company by Parliament.

*“The State’s role in the creation of corporations is central and therefore state intervention in corporate activity is more easily justified. The corporation, after all, is just a manifestation of the will of the State.”<sup>180</sup>*

With the rise of registration, and an arguably reduced role for the State in direct approbation, this theory began to falter and was replaced with the theories of corporate realism and aggregation. Corporate realism emphasised the separate legal personality of the company as distinct from its shareholders. Aggregate theory differed from this in concentrating on the private, contractual nature of the company and not drawing such a distinction between the corporation and its members. Both of these theories however repudiated the earlier belief in acquiescing to state interference in the operations of the company.

### **Case Study on State Interference in Corporate Affairs: EIC v. Railtrack**

If we briefly look back to chapter 3, and the analysis of the East India Company, I commented that a concession theory approach seemed to have been adopted wholeheartedly by the Parliament of the day, and as such it was willing to interfere in companies and even wind them up for purely political reasons. Such interference in the late 20<sup>th</sup> and 21<sup>st</sup> Centuries would be seen as unduly oppressive of corporate ‘rights’ and, although within the letter of the law (due to Parliamentary Supremacy), frowned upon not only by the company and market themselves, but also by private individuals. Corporations are no longer seen as creations or concessions of the state and cannot be considered to exist under sufferance as the early chartered companies (and even some of the later ones) did.

To give an example of how attitudes have changed I shall briefly look at the Government’s behaviour towards Railtrack in 2001.

Here was a company founded by the (Conservative) government in 1994 as a vehicle to allow the privatisation of the railway networks within the country, this company was then floated upon the stock exchange in May 1996. Obviously such a move as floating and becoming a public company would allow anyone to trade in the shares of this company. It is important at this point to realise that Railtrack was a private (in the sense of being privatised) company and not a nationalised one.

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<sup>180</sup> Dignam, A. & Lowry, J., ‘Company Law’, p. 360, 15.11



It possessed shareholders who were the owners of it. This re-iteration may seem as though I am 'over-egging' the metaphorical pudding, but it cannot be stressed enough!

On the 7<sup>th</sup> October 2001, the company was placed into railway administration<sup>181</sup> by the Transport Minister (Labour), Stephen Byers. It should be emphasised that this was not a usual administration order administered by the Courts, but a Ministerial 'decree' if you will. The reasons for this act were hotly disputed, the Chairman of Railtrack stating:

*"(The Chairman) maintained that Railtrack had not been insolvent when the government 'pulled the rug' from under it last month.*

*He also said it had "absolutely not" been asking for extra government money month after month.*

*Mr Robinson said the only reason Railtrack had been put into the control of administrators was Transport Secretary Stephen Byers' decision to withdraw future financial support and 'renege on a £450m transaction'.*<sup>182</sup>

At the point of going into administration, the shares in the parent company were worth around 280p.

This is where the relevant issues arose, as the company (although eventually removed from administration) was sold to Network Rail. The parent company of Railtrack (Railtrack Group) went into liquidation in 2002, and 70p per share was earmarked as compensation to the shareholders. Under pressure from a number of shareholder groups, this offer was increased to around 250p per share. Clearly there was still going to be a loss of at least 20p per share in value to the shareholders after they received compensation. Although many institutional investors accepted this compromise, over 49,000 private investors did not and as such began the largest class-action lawsuit ever seen in the United Kingdom.

In 2005 the shareholder group 'Railtrack Private Shareholders Action Group', took Stephen Byers to Court for the Common Law Tort of 'Misfeasance in a Public Office' in relation to his decision to

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<sup>181</sup> Under the Railways Act 1993.

<sup>182</sup> <http://news.bbc.co.uk/1/hi/business/1633471.stm>

place Railtrack into administration<sup>183</sup>. Although the case was dismissed, the entire debacle acts as proof that shareholders are not willing for the Government to interfere in the running of companies or engage in *de facto* nationalisation by replacing one floated company with a not-for-profit Government controlled alternative.

A still more recent example that perhaps more clearly illustrates the public (as opposed to shareholder) anger at governmental interference in registered companies is the 'bailing out' of the banking sector during the financial crisis.

To put it succinctly, companies directly created by Crown or Parliament will have to put up with a large level (or at the very least a significant risk) of interference in their internal governance<sup>184</sup>, but companies created by registration are a very different creature that should be left to market forces to influence and control. It seems most unlikely that any private company will have to endure the 'slings and arrows' of outrageous governmental interference that the East India Company had to. But Railtrack, and the Banking sector is proof, that there is no such thing as a certainty where politics meets the law. It seems to be a case of, 'Make what laws you will for governance of the realm and they shall be adhered to, but we shall be masters of our own company's governance'.

I feel that this is a good illustration of how the importance of registration of companies and freedom of incorporation obtains a power and 'entrenchment' in excess of that laid down legally for them. Public expectations of what a company can and cannot do, and perhaps more importantly what can and cannot be done to them will certainly play a large part in the further development of the law as it relates to companies.

The next chapter, in concluding this work, will attempt to look forward as to whether there is any role in the future for the chartered trading organisation.

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<sup>183</sup> See: *Geoffrey Rutherford Weir and Others v. The Secretary of State for Transport*, [2005] EWCH 2192 (Ch)

<sup>184</sup> Chartered Companies still come under the direct jurisdiction of the Privy Council.

## **Chapter SEVEN – *In cauda venenum***

In 2011 the chartered company can be seen as a legal and historical anachronism, having totally outlived its practical uses as a vehicle of trade and commercial expansion<sup>185</sup>.

The Companies Act 2006, was (at the time of its writing) the longest single piece of legislation ever enacted in this country, running to nearly 1000 pages of provisions, containing 1300 clauses and 16 schedules and comprising 458,737 words. In this document, the word ‘charter’ was mentioned only 4 times, and only then in a slightly different context to the one concerning us in this work. This could be taken as evidence that the day of the chartered company has finally, unequivocally come to an end.

Such an interpretation is dangerously shallow and overtly numerical in its understanding of the nature of a charter of incorporation. Chartered companies are not totally devoid of use, yet, although their form has changed substantially since the ‘golden age’ of the East India Company and the Bank of England.

Charters are clearly still in existence, with the current count of companies and organisations in possession of them numbering around the 900 mark<sup>186</sup> however they are now primarily used for charities, professional bodies and public interest corporations (i.e. the BBC) and not for trading bodies:

*“A Royal Charter is a way of incorporating a body, that is turning it from a collection of individuals into a single legal entity. A body incorporated by Royal Charter has all the powers of a natural person, including the power to sue and be sued in its own right. Royal Charters were at one time the only means of incorporating a body, but there are now other means (becoming a registered company, for example), so the grant of new Charters is comparatively rare. New grants of Royal Charters are these days reserved for eminent professional bodies or charities which have a solid record of achievement and are financially sound. In the case of professional bodies they should represent a field of activity which is unique and not covered by other professional bodies.”<sup>187</sup>*

To give an illustration of a ‘modern’ charter, see appendix II for the charter of the Worshipful Company of Actuaries, issued by the Privy Council in 2010. This lays out the powers devolved and

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<sup>185</sup> Both in terms of volume of trade and legal regulation.

<sup>186</sup> <http://www.privacy-council.org.uk/output/Page44.asp>

<sup>187</sup> Ibid.

the privileges given to this most modern of livery companies<sup>188</sup>. Perhaps a few of the ‘usual suspects’ should be re-iterated here:

- i) Permanent succession
- ii) Common Seal
- iii) Right to own property

The modern charters (particularly those for livery companies) have changed little in primary substance over the years, as can be seen by comparing Appendix I and Appendix II, a gap of nearly 300 years!

To a large extent however, the existence of something now has very little bearing on the influence that its past incarnations continue to have upon the world.

The Romans are no longer with us, but we still rely upon Latin in our work (see the title of this chapter; “The poison is in the tail”, or a rise is followed by a fall). By the same token, the chartered trading company is no longer with us as it once was, but its legacy remains a colossus on the legal stage, particularly in relation to the law of companies.

It was after all chartered companies that gave us, albeit in embryonic form; limited liability, corporate personality, concepts of stock and many more beside. If we briefly refer back to chapter two, and the main ‘privileges awarded in 1631 to the Worshipful Company of Clockmakers, namely; perpetual succession, ability to sue and be sued and the ability to hold , we can compare them to the modern concepts and find them for all intents and purposes identical.

Looking at the status of chartered companies in 2011 it is clear to see that they are no longer considered to be a viable vehicle for commercial operations by commercial interests themselves, nor is the Crown prepared to give them to such bodies:

*“An application for a Royal Charter takes the form of a Petition to The Sovereign in Council. Charters are granted rarely these days, and a body applying for a Charter would normally be expected to meet a number of criteria. Each application is dealt with on its merits, but in the case of professional institutions the main criteria are:*

*(a) the institution concerned should comprise members of a unique profession, and should have as members most of the eligible field for membership, without significant overlap with other bodies.*

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<sup>188</sup> 90<sup>th</sup> in precedence.

*(b) corporate members of the institution should be qualified to at least first degree level in a relevant discipline;*

*(c) the institution should be financially sound and able to demonstrate a track record of achievement over a number of years;*

*(d) incorporation by Charter is a form of Government regulation as future amendments to the Charter and by-laws of the body require Privy Council (i.e. Government) approval. There therefore needs to be a convincing case that it would be in the public interest to regulate the body in this way;*

*(e) the institution is normally expected to be of substantial size (5,000 members or more).<sup>189</sup>*

Realistically, is there any potential for the resurgence of the charter as a form of incorporation for trading concerns? *Prima facie*, this seems unlikely due to ease of using registration and the sheer numbers of companies in existence, however the author can see at least one recent example where this form of incorporation may be preferable to the Government, the Corporation and to the public. Could we soon see the resurgence of chartered trading companies?

### **Case Study: News Corporation, BSkyB, free markets and monopolies.**

Originally this section was written well before the political furore surrounding News International erupted in mid-2011. Although these undoubtedly crucial developments have fundamentally changed the issues surrounding further takeovers by this company, I am of the opinion that this does not remove the issues of academic interest discussed below. To avoid the use of that most ubiquitous and tiresome of phrases in legal works, that of 'Company A', 'Claimant 1' and 'Defendant π', I shall leave the names as they were before the phone hacking scandal, on the understanding that this is now a purely academic commentary, with real-life examples included to provide depth and scope.

In Late 2010 a number of reports were released arguing that the proposed purchase of the remainder (60.9%) of the shares in BSkyB by Rupert Murdoch's News Corp. would result in the

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<sup>189</sup> <http://www.privacy-council.org.uk/output/Page45.asp>

dilution of 'media plurality' and the extension of political influence over the network. The following editorial from the Financial Times serves to illustrate both the facts of the case and the opposition to it:

*"Earlier this summer, Mr Murdoch announced he would merge his main company, News Corp, with [BSkyB](#), a UK satellite broadcaster in which it already has a minority stake. . .it is imperative that Vince Cable, the business secretary, examines the deal under British rules governing media diversity.*

*There is a clear public interest case for doing so. Together, News and BSkyB would be a truly formidable beast. News accounts for some 37 per cent of national newspaper circulation in the UK while Sky has (in revenue terms) 35 per cent of the TV market – including the public sector BBC. Like other countries, Britain has laws to limit cross-media ownership. These aim to address the valid concern that a proprietor with interests in both newspapers and broadcasting might dominate the media scene, lock out challengers and stifle diversity of debate. This would be a clear risk with a News-Sky deal.*

*The rules, however, have not kept pace with the times. While newspaper groups still cannot own Britain's main commercial broadcaster, [ITV](#), no such blanket prohibitions apply to more recently-established commercial broadcasters such as Channel 5 or Sky. The anachronism becomes clear when you look beyond audience size (ITV still reaches more viewers than its commercial rivals) to revenue. BSkyB's turnover is roughly three times that of ITV and is growing much faster. In a few years time, BSkyB may have almost half the British TV market."<sup>190</sup>*

The ultimate issue here, as the author sees it, is less one of commercial plurality (a concept which most of the public would be unfamiliar with and is only relevant in abstract economic terms in this case), and more one of reliable, unbiased, free news provision. A potential solution from the author to this problem of balancing the need for a free-market with the risks of monopolistic behaviour and undue influence of the media would be one of chartered governance.

In terms of ensuring media freedom from Mr. Murdoch and News Corp. one potential option would be the creation of a chartered holding company for BSkyB (and or Murdoch's other British media outlets). At the behest of the Privy Council, the charter establishing this firm would have a number of specifically tailored rules applied to it which would be seen as unnecessary or

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<sup>190</sup> <http://www.ft.com/cms/s/0/132051fa-c40d-11df-b827-00144feab49a.html#axzz1MKZjq1dh>

dangerous were they applied to registered companies. Such rules may include having certain people on the board of directors (e.g. a government minister or civil servant, representatives from pressure groups or even from alternative media providers) or place limits on what the company can do with its' holdings. Clearly the specifics of the arrangements would be left to the Government, the Privy Council and News Corporation. If we look at the Privy Council website again, we can clearly see the legislative basis for such interference, either in whole or in part:

*"... once incorporated by Royal Charter a body surrenders significant aspects of the control of its internal affairs to the Privy Council. Amendments to Charters can be made only with the agreement of The Queen in Council, and amendments to the body's by-laws require the approval of the Council (though not normally of Her Majesty). This effectively means a significant degree of Government regulation of the affairs of the body, and the Privy Council will therefore wish to be satisfied that such regulation accords with public policy."*<sup>191</sup>

Clearly this is just a 'first-glance' solution to a very complex and intractable problem involving multi-national companies, holding companies and so-forth. Although many people may argue that having more media under the indirect control of Murdoch and the Government is just as bad as more media under the direct control of Mr. Murdoch, and such an option may not be attractive for News Corp. itself, it does illustrate the potential viability for chartered trading companies in certain specific conditions.

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<sup>191</sup> <http://www.privvy-council.org.uk/output/Page44.asp>

## **Chapter EIGHT - Conclusion**

It would seem apt, at this point, to include a brief 'potted history' of each of the conclusions drawn in this work, chapter by chapter, and then to illustrate, again; briefly, how they connect together allowing us to arrive at our final overall conclusion as given above.

In Chapter One, we discuss briefly the concept of commerce and commercial mechanics from their earliest days in the Middle East and the origin of the charter as a form of legal prescription. We examine how initially the method of 'chartering' was a governmental tool, designed primarily for 'power' sharing, but found a natural home as a tool of the trader and merchant. To put it succinctly, we establish the centuries old link between the charter and companies, but do not go any further towards explaining or illustrating the link.

Chapter Two acts to provide some back-ground to the claim made at the end of chapter one, firmly establishing the link between the charter and the 'trading companies'. This is achieved by contrasting the early gilds merchant and craft guilds with other, non-trading, chartered concerns such as Oxford and Cambridge Universities. Time is given to provide examples of some of the stereotypical rights granted by the Crown to bodies, via the medium of a charter, such as freedom from central taxation, or the right to hold a market. Finally, the 'Merchants of the Staple' are briefly dealt with, a body acting well ahead of its time, but with important parallels to its descendant bodies under Elizabeth I. Here we see the embryonic form of the charter beginning to expand outwards from its initial governance structure to a wider more commercialised one.

Chapter Three moves onto the 16<sup>th</sup>/17<sup>th</sup> Centuries, and the undisputed rise of the chartered trading companies, illustrating the now inseparable link between the charter and commerce, that which before could be dismissed as circumstantial, anomalous or slight. This chapter also, through the use of the East India Company as a case study, illustrates the phenomenal power that can be bestowed to a company via the instrument of a charter. The period covered in this chapter can be considered the pinnacle of achievement of the charter as a form of incorporation; *de facto* government of an entire sub-continent. This also illustrates the circular nature of corporate law (as previously discussed in chapter two), how the charter is once again a method of devolving governance from the central state authorities.

Chapter Four concludes by showing the immense power that companies can wield over a country in financial terms (echoed strongly in the early years of the 21<sup>st</sup> Century), but also that they may be a fundamental part of economic provision for a state. Contrary to some modern observers' thinking, it is not simply possible to completely separate bank from State, and is in fact deeply unnatural. Such entwinement in the past should act as illustration of both the growing power of



corporatism in the country at the time, but also as a timeless example of the fundamental link between big business and finance and the State.

Chapter Five and the Bubble Act is both part of the continuing story of the evolution of chartered companies, but also a cautionary tale against knee-jerk legislation and draconian responses to fiscal crises. It is hoped that this chapter provides a good justification for a subjective approach to corporate governance (for instance in the forward-thinking attitude provided by the judicature in response to the Bubble Act 1720).

In Chapter Six we attempt to describe the death of the Charter as a practical instrument for incorporating a company, and the inception (in 1844) of the Companies Acts and the resultant method of registration. This chapter's conclusion I feel to be particularly important as it illustrates a primary difference between chartering and registration as methods of incorporation. On the one hand we have large numbers of initial documents (i.e. the charters) but little if any 'follow-up' legislation to govern company behaviour (possible exceptions being that concerning the East India Company<sup>192</sup>). On the other, we see a huge *tranche* of objective, catch-all legislation, multiplying by the decade. Such a difference is an important one when considering the potential for alternatives to legislation; the amount of parliamentary time devoted to incredibly nuanced and complex legislation when some of it could be farmed out to the Privy Council.

Chapter Seven attempts to show that the charter still retains the flexibility and individualistic nature that are its trademarks and that these have, by and large, been abandoned under the registration mechanism. The availability of such subjectivity in governance should surely not be consigned firmly to the waste-paper basket of history.

To some extent, these chapters link together purely in a linear, temporal way, describing and analysing the progression of the charter (and the chartered trading company) over the last millennia. However, in addition to this, as each chapter gives way to the next, we are left with a concrete idea of discrete developments in each 'era' covered, leaving a somewhat 'jumpy' picture of evolution. This should not really come as a surprise, bearing in mind the fundamentally statute based-nature of the law, and subjective nature of the awarding of charters; changes occur as events and not as processes *per se*.

The history of the Chartered Trading Corporation has been a long one, and the history of the Charter itself, even longer. It was through their form that the current system of registration and

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<sup>192</sup> Although, bearing in mind the fundamentally governance based nature of this company, certainly in the late 18<sup>th</sup> and early 19<sup>th</sup> Centuries, this is surely to be expected.

economic liberalism came into being. Even if the Chartered Trading Corporation is to be consigned firmly to the history books, it would seem foolish not to consider the importance and formulaic success that lasted for many hundreds of years, and how that can influence, even today, the future performance and success of companies legislation.

As highlighted in chapter five and chapter seven, perhaps now would be the ideal time to consider alternative methods of business incorporation under a subjective scheme, rather than restrict the country to one system only: registration under the existing objective regime. The phrase 'freedom of choice' is one much bandied about in today's society, why should there not be such a freedom in the corporate sphere?

## **Appendix I – Charter of the Worshipful Company of Clockmakers**

Reproduced verbatim from the website of the Worshipful Company of Clockmakers:

<http://www.clockmakers.org/about/royal-charter/>

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King Charles at the request of the clockmakers within and around the City of London and with the agreement of the Lord Mayor, the Recorder and the Aldermen of the City of London decrees:

*(translation in modern English).*

1. That a body should be set up for ever, “by the name of the Master, Wardens, and Fellowship of the Art or Mystery of Clockmaking of the City of London”, to include all English-born clockmakers, whether freemen or not, who live within the City, or a radius of ten miles around it.
2. That under that name, the Company should have perpetual succession.
3. That as a body, the Clockmakers’ should be entitled to acquire and dispose of property of all kinds.
4. That as a body the Company should have the same power as an individual to plead and defend any cause in any court.
5. That for business purposes, the Company should have and use a common seal, which it may alter or re-make at any time.
6. That the Company should be able (and must) elect a Master, according to the terms set out below.
7. That three Wardens must also be elected from the Fellowship.
- 8i. That ten or more freemen of the Fellowship must be elected as Assistants.
- 8ii. That the Assistants’ rôle is to “assist and aid the Master and Wardens” in any matters concerning the Fellowship.
- 9i. That the Master Wardens and Assistants (the Court) may make decisions concerning the Fellowship by a simple majority, though this majority must include the Master and one Warden.

9ii. That the Court may create reasonable laws and ordinances (in writing) from time to time, which they believe to be honest, and good for the Company. These may relate to suitable oaths to be administered, to the governance of the horological trade (with particular reference to protecting the public interest), to maintaining the influence of the Company and to punishing and reforming abuses in the trade within the City and ten miles around it. Abuses may include the making or offering for sale badly made or deceitful goods.

9iii. That furthermore, for the good of the public and of the Fellowship, the Court may regulate all aspects of the present and future conduct of the trade throughout the whole of England.

10. That by the same simple majority (of which the Master and one Warden must be two), the Court may establish punishments and penalties for the breaking of their rules, which may include, set fines, variable fines, the destruction of badly made work or any other lawful means they may choose.

11. That the Court may keep money raised by fines for the use of the Fellowship and impose other punishments without interference from the Crown.

12. That all the bye-laws created by the Court must be obeyed, provided that they are reasonable, legal and according to the custom and usage of the City.

13. That for the future, any clockmaker within the geographical area set out, who takes an apprentice, must do so through the Clockmakers' Company, whether they are freemen of it or not. This is to ensure that the Company ultimately achieves complete control of its trade.

14i. That David Ramsay shall become the first Master of the Fellowship, he being or having been a clockmaker by profession.

14ii. That David Ramsay shall remain in office until the following Michaelmas Day and continue until a successor is elected according to the terms set out below.

15i. That similarly Henry Archer, John Wellowe and Sampson Shelton shall become the first Wardens, they being or having been clockmakers by profession.

15ii. That the appointed Wardens shall remain in office until the following Michaelmas Day and continue until successors have been elected according to the terms set out below.

16i. That James Vautrolier, John Smith, Francis Forman, John Harris, Richard Morgan, Samuel Lynaker, John Charlton, John Midnall, Simon Bartram and Edward East shall become the first Assistants and remain in office for life, unless any are removed for misbehaviour or for any other good reason.

16ii. Such a removal may again be made by a simple majority of the Court, provided the Master and one Warden are amongst them.

17i. That before he may act, David Ramsay must first take an oath on the New Testament and before the Lord Mayor for the faithful execution of his office.

17ii. That the Lord Mayor should have the power to administer such an oath to the first Master and to the first three Wardens.

18i. That annually thereafter the Court (by a simple majority, including the Master and one Warden) should and must elect one freeman of the Fellowship to be Master either on Michaelmas Day, or on the following day if Michaelmas falls on a Sunday.

18ii. That the election must be according to the rules set out below.

18iii. That the chosen candidate must be both a freeman of Company and must be or have been a professional clockmaker at the time of his election. His term of office as Master is the year ensuing, unless he dies or is removed.

19i. That before the elected Master takes office, he should take his oath “to well and truly execute the said office” before the last Master and at least two of the Wardens. Having done so, he remains in office until his successor has taken his oath.

19ii. That power is given to the Master and Wardens to administer such [oaths](#) successively.

20. That the Court may similarly elect three other freemen to be Wardens on an annual basis, according to the rules set out. The candidates must however be or have been professional clockmakers.

21i. That before the elected Wardens take office, they must take their corporal oaths to “well and truly execute” their offices, before the Master and at least two Wardens. Having done so, they remain in office until their successors are sworn.

21ii. That power is given to the Master and Wardens successively to administer such oaths.

22i. That if a Master should die in office or be removed, power is given to the Court to elect and swear a successor within one month. Their choice is restricted to one of the Wardens or Assistants. The election must be by a simple majority, including one Warden. The new Master will remain in office until the swearing in of his successor, the following Michaelmas. New Masters may be elected as often as it becomes necessary.

22ii. That the Master may be removed from office for a reasonable and just cause by a majority of the Court, which must include one Warden.

23i. That if one, two or three Wardens die in office or are removed, power is given to the Court to chose and swear replacements, according to the rules laid down. The new Wardens will remain in office until their successors are sworn the following Michaelmas. New Wardens may be elected as often as it proves necessary.

23ii. That any Warden may be removed for a reasonable and just cause, by a simple majority of the Court.

24i. That if an Assistant dies or is removed for “evil government or misbehaviour” or any other reasonable cause, the Court may elect a successor from the Fellowship by a simple majority, which must include the Master and two Wardens. The successor may not act as an Assistant until he is sworn before the Master and Wardens.

24ii. For this purpose successive Masters and Wardens are given power to administer the oath or oaths in perpetuity.

25. That the Court, or a simple majority of the members (which must include the Master and one Warden), may have the power to administer any oath or oaths which they think necessary for the good of the Company, to any freeman, citizen or outsider that they chose to involve with the Company’s affairs.

26. That the Master, Wardens and Assistants (or any two of them, provided one is the Master or one of the Wardens) or their legally appointed deputies, may go in the company of an officer or officers of the Crown to enter any kind of ship, or land-based premises, where they suspect horological items are present. There they may examine all items, whether imported or not. If they find them to be faulty, badly made or deceitful, they may remove and destroy them, or, if they

believe it to be achievable, they may see that they are put into a saleable condition. They must ensure that anything which is badly or deceitfully made, of insufficient quality metal, or made by anyone who has not served a full apprenticeship is seized in the name of the Crown. Then in the presence of the Mayor, Sheriff or chief officer of the place where the seizure is made, they must show why the object has been taken. With his permission, they may then destroy it. This power covers the whole of England and Wales and relates to anyone who is making, mending, buying, selling, (wholesale or retail) or who is in any way connected with any branch of the horological trade.

27. That if the chief officer is unable to judge the case made out before him, then the condemned object must be brought to the Company's Hall or meeting place and put before the entire Court. A decision may be made by a simple majority, which must include the Master and one Warden. The object may then be destroyed or defaced to make it unsaleable, though its owner may first appeal to the Lord Mayor.

28. That if a legally constituted Search is obstructed, either by being locked out or denied a view of the objects the members came to inspect, they have the power to break in to buildings, chests, boxes (or anywhere else that they believe work, wares or tools may be concealed) and seize them.

29. That the Master, Wardens and Assistants may present either those who offend in such matters, or information about them, to the Court of the Exchequer for punishment.

30. That no foreigner shall attempt to work within the area covered by the Charter, unless he is naturalised or with is working with a legally recognised professional clockmaker.

31. That no Englishman or foreigner who has imported any horological artifacts or parts into England or Wales, should attempt to market them before the artifacts have been brought to the Clockmakers' Hall or meeting place. There they must be inspected, approved by the Court and duly marked. The penalty for failure to observe this rule is seizure of the goods, in addition to any other penalty the law provides for contempt of a Royal command.

32. That if the owners of such goods are not satisfied with the judgement of the Court, they may appeal to the Lord Mayor and Court of Aldermen of the City of London. Pending appeal, the Master and Wardens must keep the objects safely and the Court must delay destroying or defacing them.

33. That the Master, Wardens and Assistants or any of them, (with the assistance of an officer or officers of the Crown) may search for any imported horological objects, which they believe are being offered for sale, but which have not been inspected and duly marked. They may seize any they find for the benefit of the Crown and prosecute the offenders.

34. That to cover the trouble and expense of the Court, the Company may retain half of all forfeitures, without the need to make an account to the Crown.

35. That all Crown and civic officers and officials must assist the Company in executing and enjoying all matters covered by the Charter.

36. That the Master, Wardens and Fellowship may choose “one honest and discreet person” to be known as “the Clerk”.

37. That Thomas Copley shall serve as the first Clerk. He shall remain in office for life unless there is a just reason to remove him for a misdemeanour.

38. That after the death of Thomas Copley, the Master, Wardens and Assistants may by simple majority (as before), elect another “discreet person” to be Clerk.

39. That Thomas Copley’s successors should continue in their office at the pleasure of the Master, Wardens and Assistants.

40. That Thomas Copley’s successor must first take an oath before the Master, Wardens and Assistants, or the majority of them, to “well and truly execute” his office, to “his best skill and knowledge, and according to the tenor and true meaning ” of the Charter.

41. That the Master, Wardens and Assistants, or the majority of them, are given powers to administer oaths to the named Clerk and to his successors. Also to any Beadle or to other officers of the Company.

42. That the privileges contained in the Charter may be enjoyed, regardless of any previous laws or statutes.

*Made patent and signed on the King’s behalf on 22nd August, 1631*



## **Appendix II – Charter of the Worshipful Company of Actuaries**

Reproduces verbatim from the website of the Worshipful Company of Actuaries:

<http://www.actuariescompany.co.uk/en/utilities/document-summary.cfm?docid=D409F90D-69E2-49C9-ABC6B359FE1A0A23>

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### **PREAMBLE**

ELIZABETH THE SECOND by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING!

WHEREAS the unincorporated organisation commonly known as the Worshipful Company of Actuaries (hereinafter referred to as ‘the Former Company’), a livery company in the City of London, petitioned Us for a Charter of Incorporation,

AND WHEREAS We have taken the said Petition into Our Royal Consideration and are minded to accede thereto:

NOW THEREFORE KNOW YE THAT WE by virtue of Our Royal Prerogative in that behalf and of all others powers enabling Us so to do of Our Especial grace, certain knowledge, and mere motion do hereby for Us Our Heirs and Successors will grant, direct, appoint and declare as follows:

**The Worshipful Company of Actuaries**

1 (i) The persons now members of the Former Company and all such persons as may hereafter become members of the Body Corporate or Corporation hereby constituted pursuant to or by virtue of the powers granted by these Presents and their successors shall for ever hereafter (so long as they shall continue to be such members) be by virtue of these Presents one Body Corporate and Politic by the name of The Worshipful Company of Actuaries (hereinafter referred to as the Company) and by the same name shall and may sue and be sued in all courts of law and in all manner of actions and suits, and shall have power to do all other matters and things incidental or appertaining to a Body Corporate.

(ii) The Arms Crest Supporters and Badge granted and assigned unto the former Company by Letters Patent under the hands and Seals of Garter, Clarenceux and Norroy and Ulster Kings of Arms bearing date 15<sup>th</sup> April 1980 shall be transferred unto the Company on the date on which this Our Charter shall take effect, and We do hereby give and grant unto the Company our Royal Licence and Authority that it may thenceforth bear and use the said Armorial Ensigns according to the Laws of Arms, the said transfer being first recorded in our College of Arms, otherwise this Our Licence and Permission to be void and of none effect.

**OBJECTS**

2 The Objects for which the Company is hereby constituted is to foster the profession of actuaries and to provide social intercourse and mutual information between members of that profession and in particular members of the Institute of Actuaries

**POWERS**

3 And the Company shall have the following powers exercisable in furtherance of its said objects but not otherwise, namely:

(i) To exercise the role of a livery company within the traditions of the City of London and particularly to encourage members to participate in the governance of the City of London and to support the Lord Mayor and the Aldermen

(ii) To arrange or assist others in arranging for meetings, educational courses and lectures, and dinners, lunches, and other social occasions for the interest of the members and for the development of their fellowship within the Company

(iii) To establish, manage, promote, organize, finance and encourage the study, writing, production and distribution of books, periodicals, monographs and pamphlets and the publication of educational courses and lectures.

(iv) To establish, manage, promote, organize, finance, equip and maintain libraries.

(v) To promote, commission, undertake and publish research in areas useful to the Company's Object

(vi) To create and operate a Register of Chartered Practitioners but only if this Charter shall be amended, with the approval of Our Lords of this Honourable Privy Council, so to allow.

(vii) To promote the formation of organisations, whether charitable or not, for the purpose of any of the objects of the Company and to assist such organisations as necessary in the fulfilment of their objects

- (viii) To make provision for lectureships, bursaries, prizes and grants.
- (ix) To give or lend money for the furtherance of the objects of the Company.
- (x) To create and undertake the management of any trusts or endowments and any scholarships and exhibitions for the furtherance of the Object of the Company.
- (xi) To work together with the Institute of Actuaries and any other institutions or persons having objects similar to that of the Company.
- (xii) To make suitable arrangements for undertaking the work of the Company and for organising meetings of the Company.
- (xiii) To employ such staff who shall not be members of the Court of the Company as are necessary for the proper pursuit of the Object and to make all reasonable and necessary provision for the payment of salaries, pensions and any other benefits to staff
- (xiv) To raise funds and to invite or receive contributions from any person or persons whatsoever by way of subscription, donation, and otherwise than through permanent trading
- (xv) Subject to any consents as may be required by law, to invest the monies of the Company not immediately required in or upon such investments or other property or other assets as may be thought fit.

(xvi) To purchase, take on lease or in exchange, hire or otherwise acquire real or personal property and rights or privileges therein, and to construct, maintain and alter buildings or erections.

(xvii) Subject to such consents as may be required by law to sell, let, mortgage, dispose of or turn to account all or any of the assets of the Company.

(xviii) Subject to such consents as may be required by law to borrow or raise money on such terms and on such security as may be thought fit.

(xix) To create such By-laws subject to the approval of the Privy Council and the City of London Corporation as the Court may consider necessary for the good administration of the Company. The first such By-Laws are attached to this Charter as the Schedule.

(xx ) To do all such other lawful and charitable things as are incidental to the attainment or furtherance of the said object.

Provided that:

(a) the Company's object shall not extend to the representation of the interests of members with regard to their conditions of employment, and

(b) nothing herein shall prevent any payment in good faith by the Company:-

(i) of reasonable and proper remuneration to any member, officer or servant of the Company (not being a member of its Court) for any agreed services rendered to the Company;

- (ii) to any member of its Court of reasonable out-of pocket expenses;
  
- (iii) to a company of which a member of the Court may be a member holding not more than one hundredth or such other part of the capital of such company as the Court may agree.

#### MATTERS RELATED TO PROPERTY

4 (i) The Company hereby incorporated or any persons or person on its behalf may acquire for the purposes of the Company any lands tenements or hereditaments or any interest therein whatsoever and to hold the same in perpetuity or otherwise and from time to time (subject to all such consents as are by law required) to grant demise alienate or otherwise dispose of the same or any part thereof.

(ii) Any person and any body politic or corporate may assure in perpetuity, or otherwise, or demise or devise to, or for the benefit of, the Company any lands, tenements, or hereditaments whatsoever or any interest therein.

(iii) The assets and liabilities of the Former Company including any property and monies held on behalf of or in trust for the Former Company by any person or persons or body politic or corporate shall from the date of this Our Charter become and be deemed to be the property and monies of the Company and, where necessary and as soon as may be, shall be formally transferred to the Company or such person or persons on its behalf as the Company may prescribe. Likewise, the continuing contracts of the Former Company shall be assigned to the Company as from the date of this Our Charter.

(iv) In the investment of monies belonging to or held by the Company, the Company shall seek such advice as it may see fit and shall take into account any law relating to charitable investment applicable at the time of such investment. Subject as aforesaid no liability shall attach to any officer, employee or member of the Company in respect of any loss or depreciation of any investment so made as aforesaid and any investment may be varied from time to time at the discretion of the Company.

(v) In case the Company shall take or hold any property which may be subject to any trusts, the Company shall only deal with or invest the same in such manner as allowed by law, having regard to such trusts.

(vi) The income and property of the Company shall be applied solely towards the promotion of its object as set forth in this Our Charter and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit, to members of the Company and no member of its Court shall be appointed to any office of the Company paid by salary or fees, or receive any remuneration or other benefit in money or money's worth from the Company.

#### CHARTER CHANGES

5 The members may, with the approval of the Lord Mayor and Aldermen of the City of London and by a Special Resolution passed at any general meeting by not less than two-thirds of the members present and voting, revoke, amend or add to the provisions of this Our Charter; but no such revocation, amendment or addition shall, until approved by Us, Our Heirs or Successors in Council become effectual so that this Our Charter shall thenceforward continue and operate as revoked, amended or added to. This Article shall apply to this Our Charter as revoked, amended or added to in manner aforesaid.

#### BY-LAW CHANGES

6 The members may, with the approval of the Lord Mayor and Aldermen of the City of London and by a Special Resolution passed at any general meeting by not less than two-thirds of the members present and voting, revoke, amend or add to the By-laws for the time being in force; but no such revocation, amendment or addition shall have effect until approved by the Lords of Our Most Honourable Privy Council of which approval a Certificate under the hand of the Clerk of the Privy Council shall be conclusive evidence.

#### SURRENDER OF CHARTER

7 The members may, by a Special Resolution passed at any general meeting by not less than two-thirds of the members present and voting, determine to surrender this Our Charter, subject to the sanction of Us, Our Heirs or Successors in Council and upon such terms as We or They may consider fit, and wind up or otherwise deal with the affairs of the Company in such manner as shall be determined by such resolution or, in default of such direction, as the court of law shall

think expedient having due regard to the liabilities of the Company for the time being, and if, on the winding up or dissolution of the Company, there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid or distributed among the members or any of them but shall, subject to any special trusts affecting the same, be given and transferred to some association or associations having objects similar to the objects of the Company which shall prohibit the distribution of its or their income or property amongst its or their members to an extent at least as great as is imposed on the Company by this Our Charter, such association or associations to be determined by the members at or before the time of dissolution.

#### CONCLUSION

8 And We do hereby for Us Our Heirs and Successors grant and declare that these Our Letters or the enrolment or exemplification thereof shall be in all things good firm valid and effectual according to the true intent and meaning of the same and shall be taken construed and adjudged in all Our courts of law and elsewhere in the most favourable and beneficial sense and for the best advantage of the Company any mis-recital, non-recital, omission, defect, imperfection, matter, or thing whatsoever notwithstanding.

IN WITNESS whereof We have caused these Our Letters to be made Patent.

WITNESS Ourselves at Westminster the [ ] day of [ ] in the [ ] year of Our Reign

BY WARRANT UNDER THE QUEEN'S SIGN MANUAL



BY-LAWS

## INTERPRETATION

1 In these By-Laws the words standing in the first column of the Table next hereinafter shall bear the meaning set opposite to them respectively in the second column thereof, if not inconsistent with the subject or context:-

## WORDS

## MEANINGS

The Company

The Worshipful Company of Actuaries

The Court

The governing committee for the time being of the Company

The Court Assistants

The elected members of the Court other than the Master, Past Masters, and the Wardens

The United Kingdom

Great Britain and Northern Ireland.

Month

Calendar month.

|                  |   |
|------------------|---|
| In writing       | Written, printed or lithographed, or partly one and partly another, and other modes of representing or reproducing words in a visible form including electronic form. |
| Liveryman        | A full member of the Company with full voting rights  |
| Member           | The Liverymen and Freemen belonging to the body corporate   |
| Freemen          | Members of the Company without voting rights  |
| General meetings | Meetings of the Company to which Members have a right of access   |

Words importing the singular number only shall include the plural number, and vice versa, and

Words importing the masculine gender only shall include the feminine gender; and

Words importing persons shall include corporations.

## MEMBERSHIP

2 Persons with appropriate qualifications, knowledge and experience may apply to join the Company. The Company shall comprise (a) Liverymen, (b) Freemen, and (c) Honorary Freemen

3 The criteria for the qualifications, knowledge and experience required for admission to the Company and the assessment procedures therefore, shall be as determined from time to time by the Court and shall be published in the Ordinances

4 (i). Liverymen shall have the right to vote at general meetings whereas Freemen may attend such meetings but not vote thereat. Members shall have such additional rights as the Court may determine from time to time as published in the Ordinances.

(ii) Persons of distinction who have contributed to the Company or to its aims shall be eligible for election as Honorary Freemen at an appropriate general meeting on the nomination of the Court.

(iii) Honorary Freemen shall have all the rights of Freemen.

5 The Court shall cause to be established and reviewed a statement of policy with regard to equal opportunities.

6 Every application for membership shall be in such form as shall be required by the Court.

7 Resignation of membership shall be signified in writing, but the person so resigning shall be liable for payment of the annual quarterage for the current year, together with any arrears to the date of such resignation

#### QUARTERAGE

8 The Court shall from time to time determine the annual subscription to be called the quarterage to be paid by each grade of membership.

9 The subscriptions for any subscription year shall become due on such dates as Court shall determine.

#### COURT

10 The business of the Company shall be managed by a Court. The first Court members after incorporation shall be those who have been elected to serve on the Court for the period during which incorporation shall take place. They shall respectively hold office as such for such periods as had been agreed before incorporation until the election and coming into office of their successors

11 The Court shall consist of the following voting members:

- (i) Officers of the Company who shall be appointed by the Court
- (ii) Such number of other Court Assistants being not less than 6 or more than 18 and for such periods of office as the Court from time to time shall determine and under such conditions as prescribed in the Ordinances

12 The Officers of the Company shall consist of:

- (i) The Master
- (ii) The Wardens

Only Liverymen may be elected as Officers of the Company.

13 A quorum at a Court meeting shall be as determined from time to time by the Court and published in the Ordinances. Subject to the provisions of these Bylaws, the Court may regulate its proceedings as it thinks fit. Questions arising at a meeting of the Court shall be decided by a majority of votes and in the case of an equality of votes the chairman of the meeting shall have a second and casting vote

14 The Court may make from time to time such Ordinances or subsidiary Rules as it deems necessary or expedient or convenient for the proper conduct and management of the Company and for the purposes of prescribing conditions of membership, and in particular but without prejudice to the generality of the foregoing, such Ordinances may regulate:

(i) the admission of members to the Company and the rights and privileges of such members and the conditions of membership

(ii) the conduct of members of the Company in relation to one another and to the Company's employees

(iii) the procedure at general meetings and meetings of the Court and committees of the Court.

15 The Court, by a two thirds majority of those present and subject to the approval of the Company in general meeting, shall have the power to make, alter, add to or repeal the Ordinances and the Court shall adopt such means as it thinks sufficient to bring to the notice of members of the Company all such Ordinances, which shall be binding on all members of the Company. Provided that no Ordinance shall be inconsistent with, or shall affect or repeal anything contained in the Royal Charter and Bylaws, and that each and every Ordinance shall be subject to the approval of the Court of Aldermen of the City of London Corporation.

16 The Court shall open and control such bank accounts as it may consider necessary and shall authorise from time to time the procedures for withdrawing money from such accounts.

17 The Court may form committees consisting of members of the Company and such other persons as it thinks fit and may delegate any of its powers to such committees and any such committee so formed shall in the exercise of the powers so delegated, conform to rules imposed on it by the Court.

18 No members of the Court or of any committee of the Court shall be accountable in respect of acts done or authorized to which they have not expressly assented or shall incur personal liability in respect of any loss or damage done in good faith for the benefit of the Company. The Company shall indemnify every member of the Court and of any committee, and employee of the Company against any loss or expense incurred through any act or omission done or committed by them in the course of the performance in good faith of their authorized duties on behalf of the Company.

#### THE CLERK

19 There shall be a chief executive of the Company who shall be entitled 'The Clerk' and who shall have such duties, responsibilities and conditions of appointment as the Court shall decide. The Clerk may or may not be a Liveryman of the Company.

#### THE HONORARY TREASURER

20 There may be appointed by the Court an Honorary Treasurer who shall have charge of the management of the funds of the Company.

21 The Honorary Treasurer shall ensure the preparation of the annual accounts of the Company in each year to such date as may from time to time be determined by the Court and shall present at Common Hall an Income and Expenditure Account and a Balance Sheet duly certified by the Auditors or Examiners.

#### THE CONDUCT OF MEETINGS

22 There shall be an Annual General Meeting, to be called Common Hall, held no more than fifteen months after the last Common Hall for election of Officers and Court and for receipt of the Annual Report and Accounts and the conduct of any other business for which notice has been duly given. The election of Officers and Court shall be made on the nomination of the Committee of the Court charged with making such nominations and to which any Liveryman of the Company may make a suggestion of the name of another Liveryman of the Company for consideration for nomination. There may be other general meetings during each year which shall be called by the

Clerk at the instruction of the Court or at the request in writing of twelve Liverymen.

23 (i) Notice of Common Hall shall be published at least four weeks before the date of the Meeting and shall also be sent to the Auditors or Examiners. A notice convening any other general meeting of the Company shall also be published at least four weeks before the date of the meeting and shall give the date and place of the meeting and the purpose for which it is called shall be explicitly stated. No other business shall be transacted at the meeting except on the directions of the Court.

(ii) The accidental omission to give notice of a meeting to, or the non-receipt of such notice by, any person entitled to receive notice thereof shall not invalidate any resolution passed, or proceeding had, at any meeting.

(iii) If within half an hour from the time appointed for the holding of a general meeting a quorum is not present, the meeting shall be dissolved

(iv) The Chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than business which might have been transacted at the meeting from which the adjournment took place. Whenever a meeting is adjourned for thirty days or more, notice of the adjourned meeting shall be given in the same manner as of an original meeting. Save as aforesaid, the members shall not be entitled to any notice of an adjournment, or of the business to be transacted at an adjourned meeting.

24 The Chairman at any General Meeting of the Company shall be the Master or, in his absence, a Warden.

25 At any general meeting a quorum shall be twenty Liverymen present in person.

## ACCOUNTS

26 The Court shall cause accounting records to be kept.

27 The accounting records shall be kept at such place or places as the Court shall think fit, and shall always be open to the inspection of members of the Court.

28 The Court shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the Company or any of them shall be opened to the inspection of members not being members of the Court.

29 At Common Hall, the Court shall lay before the Company proper income and expenditure account for the period since the last preceding account together with a proper balance sheet made up as at the same date. Every such balance sheet shall be accompanied by proper reports of the Court and the Auditors or Examiners and copies of such account, balance sheet and reports (all of which shall be framed in accordance with any legal requirements for the time being in force) and of any other documents required by law to be annexed or attached thereto or to accompany the same shall be sent not less than twenty-one clear days before the date of the meeting to the Auditors or Examiners and to all other persons entitled to receive notices of general meetings in the manner in which notices are herein directed to be served.

## AUDIT OR EXAMINATION

30 Once at least in every year the accounts of the Company shall be audited (or examined if the Lord Mayor and Aldermen of the City of London so allow) and the correctness of the income and expenditure account and balance sheet ascertained by one or more Auditors or Examiners.

31 Auditors or Examiners shall be appointed and their duties regulated in accordance with



the provisions of the law. The Auditors or Examiners (who shall be qualified under the law) shall be appointed and their remuneration determined by the Court.

#### NOTICES

32. A notice may be served by the Company upon any member, either personally or by sending it through the post in a pre-paid letter, addressed to such member at the registered address as appearing in the list of members or by electronic means as agreed by the member.

33 Any member described in the list of members by an address not within the United Kingdom, who shall from time to time give the Company an address within the United Kingdom at which notices may be served, shall be entitled to have notices served at such address, but, save as aforesaid, only those members who are described in the list of members by an address within the United Kingdom shall be entitled to receive notices from the Company.

34 Any notice, if served by first-class post, shall be deemed to have been served on the day following that on which the letter containing the same is put into the post, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post as a prepaid letter. Any notice served electronically shall be deemed to have been served within 24 hours.

### **Appendix III – A Brief Treatise on Stock Jobbing**

As well as comparing and contrasting the styles of governance, given the current climate in the country, it would seem appropriate to discuss a ‘third-party’ aspect of corporations, that of anger directed towards them. To assume that this is a novel phenomenon directed at bankers and financiers would be erroneous in the extreme, and goes back at least as far as the mid 18<sup>th</sup> Century.

The purpose of this appendix is two-fold; firstly to draw comparison between the behaviour of financial ‘players’ in the 18<sup>th</sup>/19<sup>th</sup> Centuries and today and the resulting ire directed towards such behaviour. Secondly, to illustrate some of the reasons why there was such intransigent opposition to moves to liquidise the markets with the advent on the Joint Stock Company Act 1844 and those that followed it. I feel that these two concepts are best discussed together as there are so many parallels between them in terms of response and reaction. Due to the comparative nature of this section, it was felt best to provide it in an appendix, rather than by diverting attention from the main body of one of the chapters.

In the current decade, a huge (some would say disproportionate) amount of anger is directed at bankers due to their (perceived?) role in the credit crunch, the lack of affordable borrowing and the swingeing political cuts invoked in the aftermath of global financial meltdown. This phenomenon of narrowly directed hate is however by no means a new one. It was at the time discussed in this chapter that a similarly hated financial group began to emerge, ‘stock-jobbers’.

The primary difference between then and now was that whilst bankers are professionals, these stock-jobbers were anyone who was seen to be making money by virtue of speculation and active trading in these early companies:

*“Present-day concerns about the need to regulate the City of London and its stock market are not a recent development. The same basic questions have troubled ministers, politicians and economists since the Glorious Revolution. In its simplest form the problem may be reduced to one of whether the City’s financial institutions, most notably the stock market, should be subjected to statutory control, or whether, and to what extent, they should be allowed autonomy and self-regulatory privileges. The debate surrounding these fundamental issues was brought into sharp focus during the 1760s and 1770s, when a whole range of*

*finance-related questions was discussed in parliament and the press. . . The villains of the piece were easy to identify, and brokers, speculators and 'jobbers' were characterized as being undesirable elements in society. The practice known as stockjobbing was depicted as representing all that was wrong with a rapidly developing and ever-changing economy."*<sup>193</sup>

Clearly speculation will have some effect on the market, but in the mid 1700's did it have enough effect to severely impair the functioning of the market and cause the problems attributed to it? Or are stock-jobbers unfairly, or at the very least disproportionately held to account? It seems that in the 18<sup>th</sup> Century as well as now, the man on the street objected to 'get-rich-quick' schemes and the making of money through no productive or useful art, mere 'multiplication'.

One particularly virulent critic (although by no means the only one) of this behaviour was Thomas Mortimer, who in a number of his published works referred to and described stock-jobbers thus:

*"(A stock-jobber) makes use of the basest stratagem (sic.) to diminish their (the shares) value, or to terrify or distress the owner into the absolute disposal of them, considerably below their real worth, such wretches ought to be considered as the pests of human society: for every mean artifice, every scandalous forgery or reports, however detrimental to their country and to their fellow subjects, is practised to raise and fall the price of the public funds."*<sup>194</sup>

*"(Stock-jobbing is) the genuine source to which we are indebted for that variety of private letters from Holland; secret intelligences, important events, bloody engagements, flat bottomed boats, Spanish fleets, fleets joining with [the] French, differences with foreign powers, death of a certain great personage . . . breaking out of the plague, alterations in the ministry and that infinite variety of et ceteras of the same kind, which*

<sup>193</sup> Bowen, H.V., *"The Pests of Human Society: Stockbrokers, Jobbers and Speculators in mid-eighteenth-Century Britain"*, *History*, 78: 38–53, 1993

<sup>194</sup> Mortimer, T., *"Elements of Commerce"*, pp. 397-8.

*are to be found every week inserted in some of our papers, and contradicted in others; but which are all subservient to the great purpose of promoting the trade of STOCKJOBING, not excepting the universal panic about mad dogs”<sup>195</sup>*

Samuel Johnson was equally critical of the rising industry, describing them as:

*“a low wretch who makes money out of buying and selling in the funds”<sup>196</sup>*

If we refer back to the article by Bowen on this matter we are given an example of this practice whereby a forged issue of *The Gazette* was published stating that a French army had entered the Low Countries, in order to effect the stock-market<sup>197</sup>! These jobbers even went so far, in 1801, as to forge the seal of the Foreign Secretary.<sup>198</sup>

This can be easily be seen as the direct antecedent, in terms of adversely affecting the markets, of some of the more esoteric and exotic financial mechanisms used in the 21<sup>st</sup> Century to manipulate share prices. In some cases, exactly the same methods were used, e.g. shorting. Gambling on the markets in these convoluted ways will clearly affect their smooth functioning, especially when they are directly designed to cause large shifts in the prices of shares (or even entire markets) up or down. This is not so much the insider trading that so much is made of today, but a more aggressive ‘insider influence’ trading that seems to be less engaged in, and certainly less broadcast, today. The Rajaratnam case provides interesting and recent examples of modern insider ‘passive’ trading:

*“In a phone call recorded by the government in 2008 Raj Rajaratnam, the boss of Galleon Group, a large hedge fund, called Danielle Chiesi, an executive at another fund, to thank her for sharing a tip. “But it’s a conquest, right?” he asks her. “It’s a conquest,” she responds. “You’re a warrior. I’m a warrior.”*

<sup>195</sup> Mortimer, T., *“Every Man His Own Broker”*, (1st edn.), pp. 32~

<sup>196</sup> Cited in Bowen.

<sup>197</sup> Bowen, H.V., *Op. Cit.* p. 42 and Pares, R., *“King George III and the Politicians”* (Oxford, 1953), p. 16.

<sup>198</sup> Pares, R., *“King George III and the Politicians”*, p. 16

*On May 11th Mr Rajaratnam lost the battle he was fighting against government prosecutors. He was convicted on 14 counts of securities fraud and conspiracy, and faces many years in prison when he is sentenced in July.”<sup>199</sup>*

As always however, it seems that at the lower end we have the picture of the scurrilous, criminal trader, out purely to further his own interests and at the other end of the scale the titan of finance and friend to the government. It has been said, although this author can find no reliable evidence to support or damn the claim, that Rothschild himself used his advance knowledge of the victory at Waterloo to net himself vast sums of money. A matter of perspective or a matter of success in the scheming?

The response to this (perceived?) behaviour can be equally critical, if somewhat less erudite. Historically it made for unlikely bedfellows of the ‘country party’<sup>200</sup> and radical politicians and the masses, both opposed to this ‘new money’. Such a backlash is similar to what we see now, for example the Headline from ‘The Sun’ on 11<sup>th</sup> February 2009: ‘Scumbag Millionaires’<sup>201</sup> and criticism from the more erudite, ‘establishment’ sections of society such as in the Financial Times. At the more extreme end, we have direct parallels between the violent attitude meted out by ‘the mob’ to stock-jobbers and that directed towards bankers at the height of the Credit Crunch. There is also some clear indication that deeper politico-economic analysis would reveal that perhaps these two groups were not, in fact, entirely to blame:

*“Stockjobbers, on the basis of a superficial analysis, offered a convenient target for those seeking to apportion blame for economic failure, hardship or distress. Indeed, at times of particularly acute depression, it was not unknown for mobs to pelt the carriages of the well-to-do in St James’s Park, and abuse the occupants with cries of ‘stockjobber’”<sup>202</sup>*

<sup>199</sup> The Economist Online, see article for further information:

[http://www.economist.com/node/18681788?story\\_id=18681788&CFID=164231593&CFTOKEN=20501146](http://www.economist.com/node/18681788?story_id=18681788&CFID=164231593&CFTOKEN=20501146)

<sup>200</sup> High-Churchmen, landowners, xenophobes and the like.

<sup>201</sup> [http://4.bp.blogspot.com/\\_ThhguC97EdA/SZKZaMfb7RI/AAAAAAAAAd8/kWnnMhevDL4/s1600-h/15220568.jpg](http://4.bp.blogspot.com/_ThhguC97EdA/SZKZaMfb7RI/AAAAAAAAAd8/kWnnMhevDL4/s1600-h/15220568.jpg)

<sup>202</sup> Carswell, J., “The South Sea Bubble” (1960), p. 143 (The reader will note that there is no comment on whether or not the inhabitants of these carriages were in fact stockjobbers or not).

*“The group called for bank bosses to be jailed and warned: ‘This is just the beginning’.*

*The attack saw the windows of Sir Fred's home, in Edinburgh's upmarket Morningside area, smashed, along with those of a dark-coloured Mercedes S600 saloon parked in the driveway.”<sup>203</sup>*

Were it not for the mention of ‘stockjobbers’ in the first extract, and were one to swap the terms ‘carriage’ and ‘Mercedes’, it would be difficult to say when these reported incidents actually took place.

In both ‘crashes’ the money of the bankers/jobbers is seen (rightly or wrongly) is seen by the wider public as having been, for want of a better word, stolen from the less well off in society. I provide two further examples to compare their remarkable similarities:

*“(They derived their profits from) . . . women, young brothers, and all such of the well meaning people of England as will dabble in the stocks without being in the secret, or without knowing how to carry on the lucrative scheme”<sup>204</sup>*

*“It’s against the law in the United States to falsify a loan application - unless you’re a banker. It’s against the law to have usurious interest rates- unless you’re a banker. It’s against the law to rob a bank - unless you’re a banker.”<sup>205</sup>*

*“In my opinion, the IMF / World Bank have long been run by the elite corporate criminals; if previous sentences are anything to go by (Enron et al) a slap on the wrist for the dude who falls on his sword is the most that can wrong; a mafia style ‘loyalty program’; those who drafted the policies of the IMF and World Bank are the not so shadowy world of the bankers.”<sup>206</sup>*

In the context of this work, and to add more colour to the opposition to the Companies Acts of the mid 1800’s, perhaps I should provide some illustrations as to why such opposition existed.

<sup>203</sup> <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5048091/Sir-Fred-Goodwin-attack-Bank-Bosses-Are-Criminals-group-claims-responsibility.html>

<sup>204</sup> Postelthwayt, M., *“The Universal Dictionary of Trade and Commerce: With Large Additions and Improvements . . .”*, 4<sup>th</sup> edn. 2 vols, 1774. p.xxxiii

<sup>205</sup> <http://www.neurope.eu/articles/90106.php>

<sup>206</sup> <http://www.energyefficienthomedesign.com.au/2008/12/bankers-%E2%80%A6-the-ultimate-thieves/>

There is no better way to do this than to give an example of the loathing in the establishment of ‘social climbers’ and ‘new money’. More often than not, it was considered that stock-jobbing or one of its bastard offspring was the cause of people getting ideas above their station and sometimes (shock, horror) actually rising above their station:

*“A poor lad without shoes, in a ragged plaid and rusty bonnet, strols [sic.] from the Highlands where he is starving. By the advantage of some genius, and that education which the poorest in Scotland attend to, he gets footing at a bankers in quality of a runner, an employment more slavish than that of a coal heaver. By assiduity, servility, fawning and all the arts and address peculiar to that people, when in subordinate state, he gains in confidence, and finds encouragement at home. This gives him credit at Jonathan’s; he makes bargains for stock to immense amount, fortune is his friend; he is supposed to have acquired £30,000<sup>207</sup>, he opens a banker’s shop, forms a partnership with real and considerable wealth; and to increase his credit engages in an expensive contested election; makes a considerable purchase; builds a palace and takes an Earl’s daughter without a baubee”<sup>208</sup>*

To the establishment at the time, this was a shocking thought indeed; the ‘plebs’ with disposable income and moving in their social circles. Were companies to become easier to establish and run, and capital to become a more fluid asset, then the social barriers would collapse.

Moving swiftly back to the 21<sup>st</sup> Century, similar views still seem to hold some support (albeit perhaps not as much, nor as vocally expressed), the true upper classes are appalled at the *nouveaux riches* and their vulgar displays of wealth, and at the same time these ‘new money men’ are loathed by the working classes (in many cases, their erstwhile equals) for their sudden meteoric rise to riches. The stereotypical ‘Essex Boy’ infesting the city for instance.

It seems that irrespective of the period in history one is to discuss, there will always be those who seek to take advantage, and on the other, those who are either directly affected by this behaviour or who are opposed to it on ideological grounds. Some things will never change.

<sup>207</sup> Nearly £2 million pounds in 2011 value.

<sup>208</sup> E.M., “Letter on Credit”, London Magazine, xli (1772), 291.

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